19-55

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 253. 18

CHARLES W. BUTTZ, EXECUTOR OF FRANCIS PERONTO, DECEASED, APPELLANT,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED AUGUST 9, 1883.

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1 THE NORTHERN PACIFIC R. R. COMPANY, Respondent,
vs.
FRANCIS PERONTO, Appellant. } N. 122.

Filed Sept. 21st, 1882.

B. S. WILLIAMS, *Clerk.*

2 *Summons for Relief. Complaint Served.*

TERRITORY OF DAKOTA, *County of Cass,* } *ss:*

District Court, Third Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff's,
against
FRANCIS PERONTO, Def't.

Summons.

The Territory of Dakota to the above-named defendant:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscribers, at the office of Thomas & Benton, city of Fargo, in said county, within thirty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer to said complaint within the time aforesaid the plaintiff in this action will apply to the court for relief demanded in the complaint.

Dated at Fargo, Dakota Territory, April 26, 1881.

WM. B. McCONNELL,
Plaintiff's Attorney.

3 *Summons. Complaint.*

JUDICIAL DISTRICT, *Cass County,* } *ss:*

District Court.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ffs,
vs.
FRANCIS PERONTO, Def't.

Filed April 4, 1882.

GEORGE I. HOOTES, *Clerk,*
By N. C. MORGAN, *Dep'y.*
WM. B. McCONNELL,
Att'y for Pl'ff.

TERRITORY OF DAKOTA, *County of Cass:*

I hereby certify and return that the within summons came to my hands on the 26th day of April, A. D. 1881, and that I served the same the 26th day of April, 1881, by delivering to and leaving with the within-named def't a true copy of the same.

J. E. HOGGART, *Sheriff,*
By C. W. HOGGART, *Dep't'y Sheriff.*

Fees $1.15.

1—253

4 TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,
vs.
FRANCIS PERONTO, Defendant.

The plaintiff, complaining of the defendant, states the following facts constituting his cause of action:

I. The plaintiff is a corporation duly organized and existing under and by virtue of that certain act of Congress approved July 2d, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Paget Sound on the Pacific coast by the northern route," and under and by virtue of the several subsequent acts and joint resolutions of Congress relating to the same subject.

5 II. That the plaintiff is the owner and seized in fee and entitled to the immediate possession of the following-described land: That part now occupied by you of the northeast corner of lot (1) of the northeast quarter (¼), section seven (7), township one hundred and thirty-nine (139) of range forty-eight (48), and south of the right of way of the Northern Pacific Railroad Company and east of the lots owned by Harry O'Neil, east of First street of Fargo, the same being within the city of Fargo and Territory of Dakota.

III. That the defendant is in possession thereof and withholds the same from the plaintiff.

Wherefore the plaintiff demands judgment—

I. For possession of the said premises.

II. For fifty dollars, the plaintiff's damages by withholding the same, together with costs of this action.

WM. B. McCONNELL,
Plaintiff's Attorney.

6 TERRITORY OF DAKOTA, *County of Cass:*

William B. McConnell, being first duly sworn, deposes and says: That he is the attorney and agent of the plaintiff in the above-entitled action; that plaintiff is a corporation, and that he makes this verification on their behalf, and that he has read the foregoing complaint and known the same to be true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

WILLIAM B. McCONNELL.

Sworn and subscribed to before me this 26th day of April, 1881.
[NOTARY SEAL.] CHARLES W. DARLING,
Notary Public in and for Cass County, Dakota.

7 Copy.

TERRITORY OF DAKOTA, *County of Cass:*

Third Judicial District.

Summons & Complaint.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
FRANCIS PERONTO.

W. B. McCONNELL,
Att'y for Pl'ff.

8 *Notice of Trial.*

TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
FRANCIS PERONTO, Defendant.

SIR: You will please to take notice that the issue in the above-entitled action will be brought on for trial at the next general term of the district court aforesaid, appointed to be held in and for the county of Cass, at the court-house, in the city of Fargo, in said county, on the 7 day of June, 1881, at the opening of said court on that day, or as soon *as* thereafter a- counsel can be heard.

Dated May 26th, 1881.

Yours, respectfully,

WM. B. McCONNELL,
Attorney for Pl'ff.

To C. W. Buttz, attorney for defendant.

9 *Notice of Trial.*

District Court.

THE NORTHENRN PACIFIC RAILROAD COMPANY, Pl'ff,
v.
FRANCIS PERONTO, Def't.

Due service of the within notice is hereby admitted this 26 day of May, A. D. 1881.

C. W. BUTTZ,
Attorney for Def't.
WM. B. McCONNELL,
Attorney for Pl'ff.

Filed May 26th, 1881.

GEO. D. FOSTER, *Clerk,*
By W. W. SMITH, *Dep.*

10 *Note of Issue.*

District Court, Cass County.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
FRANCIS PERONTO, Defendant.

Last pleading served May 23d, 1881. Wm. B. McConnell, attorney for plaintiff; C. W. Buttz, attorney for defendant.

Will the clerk please file this note of issue and enter the cause on the calendar for the June, A. D. 1881, general term of this court.

Yours, &c.,

W. B. McCONNELL,
Attorney for Plaintiff.

Filed May 26th, 1881.

GEO. T. FOSTER, *Clerk.*
By W. W. SMITH, *Dep.*

Note of Issue.

Copy.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
FRANCIS PERONTO.

11 *Answer.*

TERRITORY OF DAKOTA, *County of Cass:*

District Court, 3d Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,
vs.
FRANCIS PERONTO, Def't.

The defendant, for answer to the complaint, says that he denies each and every allegation of the plaintiff's complaint, and requests strict proof of the same, except the matters and things hereinafter admitted.

He admits that plaintiff is a corporation lawfully chartered by the said laws of the United States.

He admits that he is in possession of the land mentioned in plaintiff's complaint, and has been in such possession since the time hereinafter set forth.

The defendant, for a further defence, says that he is a natural-born citizen of the United States, and as such citizen having then
12 and there the qualifications of a pre-emptor on the 5th day of October, 1871, settled upon the north half of the northwest quarter of the northeast quarter, and lot 1; quarter of section number 7, in township numbered 139 of range numbered 48; in the district of lands, subject to sale at the land office at Pembina, Dakota Territory, containing $150\frac{95}{100}$ acres, and made improvements and

built a house on said land, and continued to improve the same for a long time, to wit, to the present.

That the defendant continued to reside upon said land, and upon the 28 of July, 1873, signed, and on the 11th day of August, 1873, presented his declaratory statement to the register and receiver of the said land office, declaring his intention to claim the aforesaid tract of land as a pre-emption right, under the act of Sept. 4, 1841.

13 And alleging settlement October 5, 1871, which said declaratory statement was filed within three months after the filing of the township plats, and according to law. That the said land officers thereupon wrongfully and unlawfully refused to permit the said defendant to pre-empt the said land, or to file his said declaratory statement, but rejected the same for the reasons following, and no others, to wit:

"The declaratory statement of Francis Peronto, &c., offered this day, cannot be filed for the reason, that lands therein described are railroad lands, as shown by a diagram filed in the Department of the Interior, 21st of Feb'y. 1872, by The Northern Pacific Railroad Company.

"The alleged settlement prior to the filing of said diagram, and withdrawed, of the odd sections, are illegal and cannot be recognized by this office as the lands, by reason of Indian treaty, were not subject to homestead or pre-emption settlement."

14 That the defendant thereupon duly appealed from the decision of said register and receiver to the Commissioner of the General Land Office, who, on or about the 14th day of February, 1874, wrongfully and under an erroneous construction of the law, approved the said decision of the land office, for the reasons following, and none others.

"Francis Peronto, &c., alleging settlement Oct. 5, 1871. * * * I have to state that I find upon examination that all of the tracts are within the limits of the grant to the N. P. R. R. Co. which attached to the odd sections May 23, 1873, and at the date of the alleged settlement the lands were embraced in the Sissiton & Whopeton Indian reservation, the Indian title to which was not extinguished until May 2nd, 1873, at which date the withdrawal for the company became effective, they ex-luding any prior pre-emption claim to the odd sections, which could only attach after the extin-

15 guishment of the Indian title."

That thereupon the defendant duly appealed from the decision of said Commissioner to the Hon. Secretary of the Interior, who on the 19th day of September, 1874, affirmed the decision of the Commissioner aforesaid, "on the ground and for the reason stated to have led to the conclusion you (the Commissioner) reached," and rejected and refused the pre-emption claim of this defendant; all of which said decisions were wrongful and unlawful, and based upon a misconstruction of the law by the officers aforesaid.

The defendant further says that the land described in the plaintiff's complaint, and for which it brings this suit, is included within and forms a part of the land described in the defendant- declatory statement aforesaid. The defendant further says that the land sued for did not vest in or become the property of The Northern Pacific

16 Railroad Company by virtue of the act of Congress refer-ed to in plaintiff's complaint or any other act; and that the land aforesaid at the date of said charter formed a part of an Indian reservation and so continued until May 6, 1873, when the Indian title was extinguished. That the said road was not "definitely located" and "a plat thereof filed in the office of the Commissioner of the General Land Office" with reference to the land in question until May 26, 1873, when the pre-emption claim of this defendant had already attached, and but for the erroneous construction of the acts of Congress creating said company he would have been permitted to pre-empt said land.

The defendant further shows that at the time of the extinguishment of the Indian title, and ever since, he has resided upon and improved the said land and claimed the same as a *bona fide*
17 pre-emption; and he is informed and believes that the plaintiff in consequence of such wrongful construction of the said laws by the said land officers has obtained the United States title to said lands, when in truth and in fact this defendant has the equitable title to said lands and is entitled to the legal title thereto.

Wherefore the defendant prays—

That the said title of the plaintiff be declared to be void and obtained in violation of law.

That the title to said land be declared to be in this defendant, and that he be quieted and protected in the possession thereof.

That the plaintiff be perpetually enjoyned from enforcing or attempting to enforce its said title; and

That such other and further relief may be granted as to
18 the court may seem proper and necessary to protect and preserve the rights of this defendant in the premises.

C. W. BUTTS, *Att'y for Def't.*
TOOMEY & FRANCIS AND
SEDDLER, MILLER AND PADGOTT,
Of Counsel.

TERRITORY OF DAKOTA, *County of Cass:*

Personally appeared before me, John T. McCarther, a notary public in and for the Territory of Dakota, Francis Peronto, the above-named defendant, and who, upon oath, after the foregoing answer (in the case of the Northern Pacific R. R. Co. *vs.* Francis Peronto) had been carefully read to him, says: That said answer is true to his own knowledge, except as to those matters and things therein stated upon information and belief; as to those matters and things he believes them to be true.

his
FRANCIS x PERONTO.
[mark.]

Witness to F. P. Mosby—
J. W. BUTTS.
W. H. BURNETT.

Sworn and subscribed before me this 23d day of May, 1881.
JOHN T. McCARTHER,
Attorney Public of Dakota.

19 TERRITORY OF DAKOTA, *County of Cass:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
FRANCIS PERONTO, Defendant.

The plaintiff, for reply to the new matter set forth in the answer, denies that the defendant is or ever has been a citizen of the United States, or that the defendant is or ever was a qualified pre-emptor of public lands of the United States, and it denies that the defendant ever settled upon the lands described in the answer, or upon any part thereof, and denies that the defendant has ever improved said lands.

The plaintiff further denies that the refusal of the officers of the local land office to receive the declaratory statement of the defendant, mentioned in the answer, was wrongful or unlawful; but avers that the same was rightful and in accordance with law.

The plaintiff further denies that the decisions of the Commissioner of the General Land Office and of the Secretary of the Interior, mentioned in the answer, were either of them erroneous; and it avers that both said decisions were rightful and in accordance with the law. And the plaintiff further alleges that his line
20 of railroad was definitely located and actually completed and put into operation from a point at the crossing of the Red River of the North, on or near the eastern boundary of the lands described in the answer, and extending across the said lands, and thence many miles westward, prior to January 1st, A. D. 1872; and that the portion of its said line so located and constructed has ever since that time been maintained by the plaintiff and operated by it; and the same -as been, long prior to the commencement of this action, *been* duly examined and approved by the Government of the United States, in the manner provided by the act of Congress of July 2d, A. D. 1864, incorporating the Northern Pacific Railroad Company.

The plaintiff further alleges that prior to March 30th, 1872, the Northern Pacific Railroad Company has duly filed in the office of the Secretary of the Interior a map showing the route of its railroad in Dakota Territory east of Missouri river, including the portion thereof actually completed and put into operation as aforesaid, whereupon the Commissioner of the General Land Office of the United States duly made out and forwarded to the register and receiver of the United States land office at Pembina, said office being that of the United States land district wherein the lands described in the answer were situated, a diagram showing the said route, and also a letter of instruction to such local land officers, of which a copy
21 is hereunto annexed, marked Exhibit A.

The lands described in the answer formed part of the said odd-numbered sections referred to in the said letter of instruction.

And the plaintiff further alleges that at the time the said portion of its line of railroad was located and completed across said lands as

aforesaid the Indian title thereto had not been extinguished; and that as soon as such title was extinguished the said land forthwith vested in the plaintiff under and by virtue of the said act of Congress, and of the several subsequent acts and joint resolutions of Congress relating to the same subject-matter, and by completion of the said portion of its line of railroad, under and in pursuance of said acts.

Wherefore the plaintiff prays judgment as in the complaint already prayed.

W. P. CLOUGH,
Att'y for Pl'ff.

22 "F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 30, 1872.

Register and Receiver, Pembina, Dakota Ter.

GENTLEMEN: I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under act of July 2d, 1864, and by diretion of the Secretary of the Interior you are directed to withhold from sale or lecation, pre-emption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles, as designated on this map.

You will also increase in price to $2.50 per acre the even-numbered sections within these limits, and dispose of them at that ratability, and under the pre-emption and homestead laws only.

No private entry of the same being admissable until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

23 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *June 11th*, 1873.

Register & Receiver, Pembina, D. T.

GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26th ult., in accordance with law, a map of the definite location of their road from the Red River of the North to the Missouri river in Dakota Ter. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty miles limits of this land grant along said line, with also the forty-mile limits of withdrawal ordered by my letter to you of March 30th, 1872, upon a designated line, and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered

sections at $2.50 per acre, within the forty-mile limits, and $1.25 per acre between the forty and fifty mile as indemnity limits. The even-numbered sections within the forty-mile limits of former withdrawal, now falling without the present corrected limits, will be reduced in price to $1.25 per acre.

The right of the road attaches to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26th, 1873, from which date also the even sections become double minimum.

24 Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

UNITED STATES LAND OFFICE,
FARGO LAND DISTRICT, DAKOTA.

I, Horace Austin, register of said land office, do hereby certify that the foregoing is a true and correct copy of letters of the Commissioner of the General Land Office at Washington, D. C., bearing dates, respectively, March 30, 1872, and June 11, 1873, and of the whole of said letters, and that the same has been carefully compared with the originals of said letters now on file in my office.

Witness my hand at the city of Fargo, D. T., this 12th day of Jan'y, A. D. 1882.

HORACE AUSTIN, *Register.*

[Endorsed:] Copy. District court for Cass county, D. T. The N. P. R. R. Co. *vs.* Francis Peronto. Reply. Filed April 4th, 1882. George I. Foster, clerk, by N. C. Morgan, dep'y.

25 F.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *November* 25, 1881.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed papers are true and literal exemplification of certain papers on file as of record in this office, as follows:

"A." Containing two (2) pages. Letter from this office to the register and receiver of Pembina, Dakota Territory, dated March 30, 1872.

"B." Containing one (1) page. Letter from said register and receiver to the Commissioner of the General Land Office, dated April 22, 1872.

"C." Containing one (1) page. Letter from the Secretary of the Interior to the Commissioner of the General Land Office, dated May 26, 1873, and the endorsements thereon of date of receipt in this office.

"D." Containing one (1) page. Declaratory statement of
26 Francis Peronto, dated July 28, 1873, and the endorsements on the face of the same.

"E." Containing one (1) page. Letter of said register and receiver

to H. S. Back, dated August 11, 1873, so far as the same relates to the claim of Francis Peronto.

"F." Containing two (2) pages. Appeal by H. S. Back, dated October 11, 1873, so far as it relates to the claim above mentioned.

"G." Containing two (2) pages. Letter from this office to the said register and receiver, dated Feb'y 14, 1874, so far as the same relates to said above-mentioned claim.

"H." Containing four (4) pages. Appeal by H. S. Back, so far as the same relates to the said claim of Francis Peronto.

"I." Containing one (1) page. Letter from the Secretary of the Interior to the Commissioner of the General Land Office,
27 dated September 19, 1874, so far as the same relates to the claim of Francis Peronto.

"K." Containing two (2) pages. Letter from this office to the said register and receiver, dated August 20, 1873.

In testimony whereof I have hereunto subscribed my name and caused the seal of the General Land Office to be affixed at the City of Washington, on the day and year above written.

[SEAL.] N. C. McFARLAND,
Commissioner of the General Land Office.

28 EXHIBIT A.

Pacific Railroad Record F. C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *March* 30, 1872.

Register and Receiver, Pembina, Dakota Territory.

GENTLEMEN: I transmit herewith diagram showing the designated rout- of the Northern Pacific railroad under act of July 2nd, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, pre-emption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of 40 miles as designated on this map.

You will also increase in price to $\$2\frac{50}{100}$ per acre the even-numbered sections within those limits, and dispose of them at that ratability, and under the pre-emption and homestead laws, no
29 private entry of the same being admissable until these lands have — offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully, W. W. CURTES,
Acting Commissioner.

"B."

U. S. LAND OFFICE, PEMBINA, D. T., *April* 22, 1882.

Hon. Willis Drummond, Commissioner of the General Land Office, Washington, D. C.

SIR: We have the honor to acknowledge the receipt of your favor

of the 30th ult., "F," also diagram showing the designated route of the Northern Pacific R. R. under act July 2nd, 1884, and
30 instructions relative to the disposition of lands within the R. R. limits.

Very respectfully,

L. B. BRASHER, *Register.*
GEORGE F. POTTER, *Receiver.*

"C"

Z. B. S. LANDS & R. R'DS,
DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *26th May*, 1873.

SIR: I transmit herewith for appropriate action map of the definite location of the Dakota division of the Northern Pacific railroad between the Red and Missouri rivers, received on the 24th instant, with letter of same date from W. K. Mendenhall, Esq., att'y for the company in this city.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

Hon. Willis Drummond, Comm'r G. L. O.
Rec'd G. L. O. May 28, 1873.

31 "D"

Declaratory Statement for Cases where the Land is not subject to Private Entry.

I. Francis Peronto, of Cass co., Dakota, being a native born citizen of the United States and head of family, consisting of wife and six children, have, on the 5th day of October, A. D. 1871, settled and improved the N. ½ of N. W. ¼, and N. W. ¼ of N. E. ¼, and lot 1 quarter section number 139, of range number 40, in the district of lands subject to sale at the land office at Pembina, D. T., and containing $150\frac{95}{100}$ acres, which land has not yet been offered at public sale, and thus rendered subject to private entry; and I do hereby declare my intention to drain the said tract of land as a pre-emption right, under the provisions of said act of September 4, 1841.

32 Given under my hand, this 28th day of July, A. D. 1873.

his
FRANCIS x PERONTO.
mark.

In presence of—
H. S. BACK.

U. S. LAND OFFICE,
PEMBINA, D. T., *January* 27, 1874.

Application of Francis Peronto rejected. Embraces railroad lands.

GEORGE F. POTTER, *Receiver.*

"E."

LAND OFFICE, PEMBINA, D. T.,
11 *August*, 1873.

H. S. Back, Esq., present:

The declaratory statement of Francis Peronto * * * of-

fered this day, cannot be filed for the reason that the lands therein described are railroad lands, as shown by the diagram filed
33 in the Department of the Interior 21st of February, 1872, by the Northern Pacific Railroad Company.

The alleged settlement prior to the filing of the said diagram and withdrawal of the odd sections are illegal, and cannot be recognized by this office, as the lands, by reason of Indian treaty, were not subject to homestead or pre-emption settlement.

* * * * * * *

Very respectfully,

L. B. BRASZER, *Register.*
GEORGE F. POTTER, *Receiver.*

"F."

PEMBINA, D. T., *October* 11, 1873.

Register & Receiver U. S. Land Office:

GENTLEMEN: As an attorney for Francis Peronto * * * I hereby appeal from yours decision to refuse to receive
34 their declaratory statements to the hon. Commissioner of the General Land Office for the following reasons, to wit:

1st. That the Northern Pacific Railroad Company has no rights to said lands before the extinguishment of the Indian title.

2nd. That the rights of settlers commence simultaneously with the extinguishment of the Indian title.

3d. That section three of the act chartering the Northern Pacific Railroad Company says, in effect—

"That whenever the odd sections are occupied by homestead settlers, then other lands must be taken in lieu thereof."

Also that said odd sections must be "free from pre-emptions claims or rights" at the time the map of survey is filed with the Secretary of the Interior.

35 4th. We claim settlement prior to any filing of map or diagram of preliminary survey with the Secretary of the Interior.

Wherefore we ask that our declaratory statement be received preparatory to entering into contest to secure our rights to the said land.

Very respectfully,

H. S. BACK,
Att'y for the above Claimants.

"G."

F. DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Feb'y* 14, 1874.

Register and Receiver, Pembina, D. T.

GENTLEMEN: Referring to your letter of October 16 and January 27th last, transmitting papers on appeal from your decision
36 rejecting the declaratory statements of the following parties for conflict with the grant to the Northern Pacific R. R. Co. to wit—

Frances Peronto, N. ½ N. W. ¼ & N. W. ¼ of N. E. ¼, and lot 1, sect. 7, 139–48, alleging settlement October 5, 1871—

* * * * * *

I have to state that I find upon examination that all of the tracts are within the limits of the grant to the Northern Pacific R. R. Co. which attached to the old sections May 26, 1873, and at the date of the alleged settlement the lands were embraced in the Sissiton and Whopeton Indian reservation, the Indian title to which was not extinguished until May 2nd, 1873, at which date the withdrawal for the company became effective, thus excluding any prior pre-emption claims to the odd sections, which could only attach after the extinguishment of the Indian title. I therefore approve
37 your action in rejecting the declaratory statements as to the odd sections, and you will so advise the parties, allowing the usual sixty days for appeal.

Very respectfully, WILLIS DRUMMOND,
Commissioner.

"H."

To the honorable Commissioner of the General Land Office, Washington, D. C.:

SIR: Your decision of the fourteenth of February, 1874, relative to the case of Francis Peronto * * * *vs.* The Northern Pacific Railroad Company was received by me March 20, 1874.

I would respectfully appeal from your decision in the case to the honorable Secretary of the Interior.
38 The points of exception to the ruling are of a general as well as of a specific nature.

First. Exceptions are taken to the ruling that the said R. R. Co. have a right to file a map for lands to which the Indian title has not been extinguished, or that the preliminary survey and other proceedings which must necessarily preceed the filing of the map, in order to render the map or its filing legal, could have taken place before the extinguishment of the Indian title any more than settlers could make a legal settlement prior to that time. Hence, no survey, location, or map could have been made, perfected, or filed so as to take effect the moment or day of the extinguishment.

Second. To giving the said R. R. Co rights to lands within said reservation that are denied to settlers.

Third. To the ruling that the withdrawal of odd sections
39 for the company became effective prior to the time the grant attached or prior to the time when the rights of the settlers could or did attach.

Fourth. To the ruling that the odd sections occupied by *bona fide* settlers at the date of extinguishment of Indian title and at the date of the withdrawal of said lands should revert to said company or that the rights of the company should attach thereto to the exclusion of the rights of the settlers.

Argument.

First. There is nothing in the charter of said railroad co. granting rights to any lands to which the Indian title is not extinguished, and the Land Commissioner's instructions of August, 1873, to the register and receiver of the land office in the Pembina district relative to the status of these lands were to the effect "that railroad settlers and Sioux half-breed scrip claimants had no rights previous to extinguishment of Indian title, and all claimants should appear after such extinguishment and make their filings."

Second. The honorable Commissioner, by his decision, gives to the R. R. company the privilege of filing their claim to these lands long before the Indian title was extinguished and prior to the time he states that their grant attached. We do not claim that the settlers acquired any legal rights prior to the extinguishment of the Indian title, but that the practice of the Department permits therein to date their declaratory statement back to date of settlement; but if this practice or usage of the Department is to be changed to their detriment in this instance, yet being upon lands the instant the extinguishment is perfected, their rights must attach, and such lands must be considered as held adversely to and reserved from the company grant.

Third. According to the honorable Commissioner'- ruling, there are twenty-three days from the time of the date of withdrawal, May 2, 1873, and the time the grant attached, May 26th, 1873. Section three of the charter of said company says: "That odd sections not occupied by settlers at the time of withdrawal are hereby granted," &c. If the rights of the settlers and of the company were to take effect simultaneously, yet the settler excludes the company (to the sections actually occupied) by virtue of their charter.

Fourth. We claim the rights of pre-emption, under the law approved March 27th, 1854, entitled an act for the relief of settlers on lands reserved for R. R. purposes.

HENRY S. BACK,
Attorney for Appellant.

"I."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *September* 19, 1874.

SIR: In the case of Francis Peronto * * * *vs.* The Northern Pacific Railroad Company, involving title to certain lands formerly included within the claim of the Sisseton and Wahpeton bonds of Santee Sioux Indians, on appeal.

I affirm your decision of February 14th, 1874, in favor of the company, on the grounds and for the reasons stated, to have led to the conclusions you reached, and return herewith the papers transmitted with your letter of June 5th, 1874.

Very respectfully,

C. DELANO,
Secretary.

To the Comm'r of the General Land Office.

"K."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *August*, 20, 1873.

Register and Receiver, Pembina, Dakota:

GENTLEMEN: Refer-ing to my letter to you, of the 11th instant, in reply to telegram of 6th, I have now to advise you further
44 respecting the lands lately held by the Sisseton and Wahpeton bands, under the second article of the treaty of 19 of February, 1867. By letter of June 25th, 1873, from the honorable Commissioner of Indian Affairs, this office was informed that the consent of the Indians to the amended agreement, confirmed by act of Congress, February 14, 1873, had been obtained on the 2nd of May last, and the proceedings approved by the secretary on the 19th of June, ultimo.

The lands became thereby a part of the public domain for disposal as other lands after May 2, 1873.

The map of general route of the Northern Pacific Railroad through these lands was filed February 21, 1872, and upon extinguishment of the Indian title they fell within the provisions of the sixth
45 section of the act of July 2, 1864, so far as they lie within forty miles of such general route.

Upon the definit- location, — 26, 1873, the odd sections became a part of the grant to the company and the indemnity right of selection vested in the ten miles additional limits as per instructions to you of the 11th of June last. You will be governed in your action respecting these lands by the foregoing.

The even sections within the forty miles limits of the definite location must be held at $2.50 per acre, and only disposed of under the homestead and pre-emption laws.

Very respectfully,

WILLIS DRUMMOND,
Commissioner.

46 The Northern Pacific Railroad Co. *vs.* Francis Peronto. Filed April 1st, 1882.

GEORGE I. FOSTER, *Clerk*,
By N. C. MORGAN, *Dep'y.*

47 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *December 7th*, 1881.

I, N. C. McFarland, Commissioner of the General Land Office, do hereby certify that the annexed paper is a true and literal exemplification of a letter from the Secretary of the Interior, dated May 26th, 1873, and the endorsement thereon of the date of receipt in this office, and that the annexed tracing is a true and literal exemplification of the map of the Dakota Division of the Northern Pacific railroad between the Red and Missouri rivers, received with said letter.

In testimony whereof I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[U. S. G. L. O. Seal.]

N. C. McFARLAND,
Commissioner of General Land Office.

LAND & R. R. OF DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 26*th May*, 1873.

SIR: I transmit herewith for appropriate action map of the definite location of the Dakota Division of the Northern Pacific railroad between the Red and Missouri rivers, received on the 24th instant, with letter of same date from W. R. Mendenhall, Esq., att'y for the co. in this city.

Very respectfully, your ob't servant,

C. DELANO, *Secretary.*

Hon. Willis Drummond, Com. G. L. O.

(Rec'd G. L. O. May 26, 1873.)

48 EXHIBIT L.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., *Dec.* 8, 1881.

I, Hiram Price, Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true and literal copy of the agreement between the United States and the Sissiton and Wahpeton Indians of Dakota, executed at Sissiton agency, Lake Traverse reservation, D. T., May 2d, 1873, and Fort Totton agency, Devil's Lake reservation, May 19th, 1873, except that the words "eight hundred thousand dollars," on page 2, line 20; the word "included," on page 4, line 11; the word "amount," on page 4, line 13, and the words "as hereby amended," erased, do not appear on the original, and the word "contained" is interlined, in liew of the word "included," on page 4, line 11, to correspond with the original, as the same appears in the files in this office.

H. PRICE, *Commissioner.*

49 DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *Dec.* 8, 1881.

I, S. J. Kirkwood, Secretary for the Department of the Interior of the United States of America, do hereby certify that Hiram Rice, whose name appears signed to the foregoing certificate, is now, and was at the time of signing the same, Commissioner of Indian Affairs, and that full faith and credit are due to his official acts as such; and that the paper hereunto attached is a true and literal copy of the agreement between the United States and the Sisseton and Wahpeton Indians of Dakota, executed at Sisseton Agency, Lake Traverse reservation, May 2nd, 1873, and Fort Totten Agency, Devil's Lake reservation, May 19th, 1873, except that the words

"eight hundred thousand dollars," on page 2, line 20, the
50 word "included," on page 4, line 11, the word "amount," on page 4, line 13, and the words "as hereby amended" erased, do not appear on the original, and the word "contained" is interlined in lieu of the word "included," on page 4, line 11, to correspond with the original, as the same appears in the file in this department.

In testimony whereof I have hereunto set my hand and have caused the seal of said department to be affixed on the day and year above written.

[SEAL.] S. J. KIRKWOOD, *Secretary.*

51 Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians on the 20th day of September, A. D. 1872, made and entered into an agreement in writing, signed on one part by the chiefs and headsmen of said bands, with the assent and approval of the members of (said) bands, and upon the other part by Moses N. Adams, James Smith, Jr., and William A. Forbs, commissioners on the part of the United States, which said agreement is as follows, to wit:

Whereas the Sisseton and Wahpeton bands of Dakota or Sioux Indians made and concluded a treaty with the United States, at the city of Washington, D. C., on the 19th day of February, A. D. 1867, which was ratified, with certain amendments, by the Senate of the United States on the 15th day of February, A. D. 1867, and finally promulgated by the President of the United States on the
52 2nd day of May, in the year aforesaid, by which the Sisseton and Wahpeton bands of Sioux Indians ceded to the United States certain privileges and rights supposed to belong to said bands in the territory described in article II of said treaty; and

Whereas it is desireable that all said territory, except the portion thereof comprised in what is termed the permanent reservations, particularly described in article- III and IV of said treaty, shall be ceded absolutely to the United States upon such considerations as in justice and equity should be paid therefore by the United States; and

Whereas said territory now proposed to be ceded is no longer available to said Indians for the purposes of the chase, and such value or consideration is essentially necessary in order to enable said bands interested therein to cultivate portions of
53 said permanent reservation and become wholly self-supporting by the cultivation of the soil and other pursuits of husbandry:

Therefore, the said bands represented in said treaty, and parties thereto, by their chiefs and headmen, now assembled in council, do propose to M. N. Adams, William H. Forbes, and James Smith, Jr., commissioners on behalf of the United States, as follows:

First. To sell, cede, and relinquish to the United States all their right, title, and interest in and to all lands and territory particularly described in article II of said treaty, as well as all lands in the Territory of Dakota to which they have title or interest, excepting

the said tracts particularly described and bounded in article- III and IV of said treaty, which last-named tracts and territory are expressly reserved as permanent reservation for occupancy and
54 cultivation, as contemplated by article- VIII, IV, and X of said treaty.

Second. That, in consideration of said cession and relinquishment, the United States should advance and pay annually, for the term of ten years from and after the acceptance by the United States of the propositions herein submitted, eighty thousand ($80,000) dollars, to be expended, under the direction of the President of the United States, on the plan and in accordance with the provisions of the treaty aforesaid, dated February 19, 1867, for goods and provisions, for the erection of manual labor and public schools, and to the erection of mills, blacksmith-shops, and other work-shops, and to aid in opening farms, breaking land, and fencing the same, and in furnishing agricultural implements, oxen and milk cows, and such other beneficial objects as may be deemed most conducive to
55 the prosperity and happiness of the Sissetons and Wahpeton bands of Dakota or Sioux Indians, entitled thereto according to the said treaty of February 19, 1867; such annual appropriations or considerations to be apportioned to the Sissetons and Devil Lake Agencies in proportion to the number of Indians of the said band located upon the Lake Traverse and Devil's Lake reservations respectively; such apportionment to be made upon the basis of the annual reports or returns of the agents in charge, said considerations, amounting in the aggregate to $800,000, payable as aforesaid without interest.

Third. As soon as may be the said territory embraced within said reservation described in article IV (Devil's Lake reservation) should be surveyed, as Government lands are surveyed, for the purpose of enabling the Indians entitled to acquire permanent rights in
56 the soil, as contemplated by Article V of said treaty.

Fourth. We respectfully request that, in case the foregoing propositions are favorably entertained by the United States, the sale of spirituous liquors upon the territory ceded may be wholly prohibited by the United States Government.

Fifth. The provisions of article V of the treaty of Feb. 19, 1867, to be modified as follows: An occupancy and cultivation of five acres upon any particular location, for a term of five consecutive years, shall entitle the party to a patent for forty acres; a like occupancy and cultivation of ten acres, to entitle the party to eighty acres; and a like occupancy and cultivation of any tract to the extent of twenty acres shall entitle the party so occupying and cultivating to a patent for 160 acres of land. Parties who have
57 already selected farms, and cultivated the same, may be entitled to the benefit of this modification. Patents so issued (as hereinbefore set forth) shall authorize a transfer or alienation of such lands situated within the Sisseton agency, after the expiration of ten years from this date, and within the Devil Lake reservation after the expiration of fifteen years, but not sooner.

Sixth. The consideration to be paid, as hereinbefore proposed, is

in addition to the provisions of article VI of the treaty of February 19, 1867, under which Congress shall appropriate, from time to time, such an amount as may be required to meet the necessity of said Indians, to enable them to become civilized.

Seventh. Section sixteen thirty-six within the reservation shall be set apart for educational purposes, and all children of a suitable age within either reservation shall be compelled to
58 attend school at the discretion of the agents.

Eighthly. At the expiration of ten (10) years from this date all members of said bands under the age of twenty-one years shall receive 40 acres of land from said permanent reservation in fee simple.

Eighth. At the expiration of ten years the President of the United States shall sell or dispose of all the remaining or unoccupied lands in the Lake Traverse reservation (except*ion* that which may hereafter be set apart for school purposes), the proceeds of the sale of such lands to be expended for the benefit of the members of said bands located on said Lake Traverse reservation; and at the expiration of fifteen years the President shall sell or dispose of all
59 the remaining unoccupied lands (excepting that which may be hereafter set apart for the school purposes) in the Devil's Lake; reservation the proceeds of the sale of such lands shall be expended for the benefit of all members of said bands who may be located on the said Devil Lake reservation.

"Executed at Sisseton agency, Dakota Territory, Lake Traverse reservation, this 20th day of September, A. D. 1872."

And whereas the Congress of the United States, upon consideration of the provision of said agreement hereinbefore recited, did, by the act making appropriation for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulalations with the various Indian tribes for the year ending June thirtieth, eighteen hundred and seventy-four, and for other purposes, approved February 14, 1873, provides as follows, to wit, "For
60 the amount, being the first of ten installments of the sum of eight hundred thousand dollars named in a certain agreement made by commissioners appointed by the Secretary of the Interior under the provisions of the act of June seventh, eighteen hundred and seventy-two, with the Sisseton and Wahapeton bands of Sioux Indians for the relinquishment by said Indians of their claims to or interest in the lands described in the second article of the treaty made with them February 19, 1867, the same to be expended under the direction of the President for the benefit of said Indians in the manner prescribed in said treaty of 1867, as amended by the Senate, eighty thousand dollars.

And the said agreement is hereby confirmed, excepting so
61 much thereof as is contained in paragraphs numbered, respectively, third, fourth, fifth, sixth, seventh, eighth, and ninth: Provided, That not — of this amount shall be expended until after the ratification by said Indians of said agreement;"

And whereas the said bands of Dakota Sioux Indians have been duly assembled in council, and therein represented by the chiefs and headmen, and the provisions of said act of Congress, and amend-

ments thereby made to the said above-recited agreement having been fully explained by the commissioners on the part of the United States, and the said agreement, as amended, having been fully interpreted, and now being understood, we, the said chiefs and headmen of the said Sisseton and Wazpton bands, duly authorized by our people so to do, do hereby accept, assest, confirm, ratify,
62 and agree to the said amendments, and to the said agreements as amended, and declare that the same is, and shall hereafter be, binding upon us and the members of said bands.

Witness our hands and seals at the Lake Traverse agency, Dakota Territory, this second day of May, A. D. 1873.

GABRIELL RENVILLE.
WAMDIENPIDIRTA his x mark.
TACANDUPAKOTANKA his x mark.
WICANSPINUPA.
ENTINKIYA.
HOKXIDANNAXTE his x mark.
WAKANTO his x mark.
WAMDIDUTA his x mark.
WAXICUNMAZA his x mark.
WASUKIYE his x mark.
TARAMPIPETA his x mark.
AKICITANAJIN his x mark.
XUPEKIYN his x mark.
MAGAIYAKE his x mark.
PETER TAPETATANKA.
TAMNIYAGE his x mark.
ITOJANJAN his x mark.
INIHAN his x mark.
MICHAEL RENVILLE.
IXAKIYE his x mark.
63 PAUL MAZAWAKUTEMANI his x mark.
ELIAS CRANWAYAKAPI his x mark.
KAMPESKA his x mark.
SIMON ANAWAGMANI his x mark.
JOHN R. RENVILL.
DANIEL RENVILL.
TAOKIYEOTA his x mark.
MACHAEL PAUL.
JOHN WANIYARPEYA his x mark.
ROBERT HOPKINS.
ALX. LA FRAMBOISE.

We certify, on honor, that we were present and witnessed of the Indians above.

G. H. HOWES.
H. T. LOVETT.
JOHN L. HODGMAN.
CHARLES P. LA GRANGE.

I hereby certify, on honor, that I have fully explained to the Indians, in council, the above instrument, and that the Indians acknowledged the same to be well understood by them.

THOMAS A. ROBERTSON, *Interpreter.*

64 Executed at Sisseton agency, Lake Traverse reservation, D. T., this second day of May, 1873.

MOSES N. ADAMS,
JAMES SMITH, JR.,
Commissioners.

DEVIL'S LAKE RESERVATION,
FORT TOTTON AGENCY, D. T., *May* 19, 1873.

WAH-NA-TA his x mark.
TEE-OH-WASH-TAG his x mark.
MAH-PEE-AH-KEO-DEN his x mark.
E-V(E)PE-KA-GE his x mark.
CHON-TE-MA-ZA his x mark.
CA-DO-YE his x mark.
WA-KIN-YAN-RO-TA his x mark.
I-CAR-TA-KE his x mark.
IN-IM-U-TA-PA his x mark.
MU-I-YA-TO-HO-NAX-TE.
TOM-WAN-NON-PA his x mark.
WE-I-YA-KA-MA-ZA.
MA-KA-NA-HU-HU-ZA.
MA-KA-I-DE-YA his x mark.
XIP-TO his x mark.
WA-KA-NO-KI-TA his x mark.
TA-TE-O-PAX-IM-A-NI his x mark.
KU-PAHU-WA-KAM-A his x mark.
65 A-KI-CI-TA-DU-TA his x mark.
TA-WA-CIN-HA his x mark.
RU-PAHN-WAX-TE his x mark.
RI-O-IN-YAN-I-YAN-KE his x mark.
RAN-IN-WAN-KE his x mark.
MA-ZA-HA-HOM-NI.
WAM-DI-HI-YE-YA his x mark.
WI-CER-PI-WA-KAN-NA his x mark.
WAX-I-EM-U-NAPE-WU-AZ-U-AZ his x mark.
HA-OIH-DA his x mark.
WAM-DI-O-KI-GA his x mark.
WA-KAN-HOI-MA-YA his x mark.
HE-WA-KA-NA his x mark.
I-HOW-GI his x mark.
MA-KOI-MA-ZA-LE his x mark.
TA-RIN-CA-SIN-TE his x mark.
NA-GI-WA-KAM his x mark.
WE-CI-NI-HON his x mark.
CO-JE-VAN-I-CA his x mark.
WAM-DI-CAX-KPI his x mark.
TATE his x mark.
U-JIN-PI his x mark.
HINT-KA-RO-TA his x mark.
HIN-HAN-XO-NO his x mark.

Wttnesses to the signatures of above chiefs and soldiers:
LEWIS CASS HUNT,
Lieut. Col. 20th Infantry.
JAMES B. FERGUERSON,
Act. Ass't Surgeon U. S. A.

66 I hereby certify upon honor that I have fully explained to the Indians the above instrument, and that the Indians acknowledge the same to be well understood by them.
GEORGE H. FARIBAUET, *Interpreter.*

Executed at the Fort Totton agency, "Devil Lake" reservation, this 19 day of May, 1873, in open council, by the Sisseton and Wahpeton bands of Sioux, of "Lake Traverse" reservation, who signed this on the 2nd day of May, 1873, as above written.
JAMES WRIGHT, JR.,
WM. H. FORBES,
MOSES N. ADAMS,
Commissioners.

67 *Testimony.*

THE NORTHERN PACIFIC R. R. CO. *vs.* FRANCIS PERONTO.

DEC. 29, 1881.

JOSEPH DELARIES, witness for defendant, being called and sworn, testified as follows:

Direct examination by Mr. TOOMEY:

Q. What is your name?
A. Joseph Delaries.
Q. Where do you live?
A. My home is at Pembina.
Q. In this Territory?
A. Yes.
Q. How long have you lived in this Territory?
A. About thirty-five years.
Q. Are you acquainted with Francis Peronto?
A. Yes.
Q. How long have you known him?
A. About forty-three years.
Q. State where you first became acquainted with him.
A. At Winnepeg.
68 Q. State whether or not you knew Francis Peronto's mother.
A. Yes, was well acquainted with her.
Q. How many years have you been acquainted with her?
A. Have been well acquainted with her about 35 years; knew her a little before.
Q. How long since you first knew her at all?
A. About 42 or 43 years.
Q. State whether or not she was a white woman.

(Objected to by Mr. McConnell.)

A. Yes, sir; she was a white woman.

Q. State whether or not she was so reputd in the neighborhood and among her acquaintances.

(Objected [to] by Mr. McConnell.)

A. Yes.

Q. State if you know of what nationality Francis Peronto's mother was.

(Objected [to] by Mr. McConnell.)

69 A. She always said she was a French woman from *from* the old country.

Q. State if you know what language she spoke?

A. French.

Q. State whether or not from your acquaintance with her you regarded her as a French woman.

(Objected [to] by Mr. McConnell.)

A. Yes; I did.

Q. You may state where you were born.

A. I was born in Canada.

Q. State whether or not you speak French.

A. Yes.

Q. State whether, from your knowledge of Francis Peronto's mother, you regarded [her] as a French woman.

(Objected [to] by Mr. McConnell.)

A. Yes.

Q. State whether or not she spoke the French language.

A. Yes; all the time.

Q. State whether or not you are familiar with the Indian race.

A. Yes.

70 Q. State whether or not Francis Peronto's mother had any of the features and peculiarities of the Indian race.

(Objected [to] by Mr. McConnell.)

A. No.

Q. State whether or not you are familiar with what is commonly called half-breeds or mixed people.

A. Yes.

Q. You may now state whether or not Francis Peronto's mother had any indication whatever of being a half-breed.

(Objected [to] by Mr. McConnell.)

A. No, sir.

Q. Describe, if you can, the general features, color of hair, color of eyes, and complection of Francis Peronto's mother.

A. Her hair was a little more curly than mine—not as dark as mine; her eyes, blue; she was a white woman, with a red face.

Q. What were the general features?

71 A. She had round face; was a fat woman.

Q. How about her cheek bones?

A. Round—not prominent.
Q. What do you mean by red face?
A. With color on her face.
Q. State whether or not you knew Francis Peronto's father.
A. Yes.
Q. State, if you know, what race his father belonged to.
A. Well, he looked like a Frenchman.
Q. State, if you —, whether or not he had Indian blood, and, if —, to what proportion.
A. I could not tell. He looked like [a] white man and never spoke anything but French.
Q. State if you know where Francis Peronto was born.
A. Yes.
Q. State where.
A. At Goose River, in Dakota.
Q. State, if you know, how far from Fargo, D. T.
A. I don't know exactly.
72 Q. About how far?
A. About 35 or 38 miles.
Q. Do you know where Grand Forks is?
A. Yes.
Q. State whether or not he was born between Fargo and Grand Forks.
A. Yes; about 34 or 35 miles from Grand Forks.
Q. About how far from the Red river?
A. His mother told me about 18 or 20 miles back from the river.
Q. How long since his mother died?
A. Three years.
Q. State where she died.
A. At my house in Pembina.

Cross-examination by M. McConnell:

Q. How old are you, Mr. Delarier?
A. I will be 67 on the fourteenth of March.
Q. You say you have been in Dakota about 35 years?
73 A. Yes.
Q. And have known Francis Peronto 42 or 43 years?
A. Yes.
Q. Where did you know him before you came to Dakota?
A. At Fort Gary.
Q. Have you resided in Pembina for 35 years?
A. Not all the time; lived 5 years at St. Cloud.
Q. When was that?
A. Twelve years ago.
By the Court: St. Cloud, Minnesota?
A. Yes.
By McConnell: When you went to Fort Gery, was not there a great many Indians there?
A. Yes; a good many then.
Q. Was there a good many half-breeds living there?
A. Yes.

Q. Did the half-breeds of that vicinity generally speak the French language?

74 A. They always spoke mixed French and Indian; some French words and some Chippeway.

Q. Did not some of the Indians speak French pretty well?

A. Very few; I have known only one who spoke French well.

Q. How close did you live to Pembina?

A. About 5 miles.

Q. How long half you lived on that farm?

A. Five years.

Q. Where did you live before you went on that farm?

A. On the next farm; gave that one to my son and moved on the next.

Q. When you came to this country were there many French people at and near Fort Garey?

A. Yes.

Q. Fort Gary and Winnepeg are very close together, are they not?

A. They are the same town.

Q. Were you married when you came here?

75 A. No.

Q. Are you or your wife any relation to Peronto?

A. No.

Q. How close did you live to Peronto's father and mother?

A. Not very close while his father was alive, but only two or three acres after his father died.

Q. Did she move to Pembina when you did?

A. Yes.

Q. Where did she die?

A. At my house.

Q. When did Peronto's father die?

A. I think about 39 or 40 years ago.

Q. Where did he die?

A. At For Garey. He started from Pembina sick, and went there and died.

Q. How long were you acquainted with him before he died?

A. I got acquainted with him about the same time as with the boy.

76 Q. Then you must have known him 4 or 5 years before he died?

A. Yes.

Q. How close did you live to his father?

A. About six miles.

By Mr. TOOMEY:

Q. His father had a farm there?

A. Yes.

(Cross-examination resumed):

Q. How old is Francis Peronto now?

A. I think he is about 54.

Q. He was born on the Goose river?
A. Yes.
Q. Do you know that?
A. No; only from his mother; she told me so last time, 5 days before she died.
Q. Has not Peronto been regarded as a half-breed Indian?
A. No.
Q. Has not his father been regarded as a half-breed Indian?
A. No.
Q. He has not?
A. No, sir.
77 Q. Have not people of the same color as Peronto living up there been treated and regarded as half-breeds?
A. There were a good many Frenchman *as* look *as* Peronto. I had a brother darker than Peronto.

78 *Action for Ejectment.*

NORTHERN PACIFIC RAILROAD CO. *vs.* FRANCIS PERONTO.

W. P. CLOUGH, for pl'ff; Maj. C. W. BUTTZ, for def't, and TOOMEY FRANCIS, of counsel.

FRANCIS PERONTO, def't, sworn, testifies, thro' the interpreter, Mr. Miller.

Examination by Maj. BUTTZ:

Q. State your name.
A. Francis Peronto.
Q. State your age.
A. Fifty-four years old.
Q. Your place of residence.
A. Fargo, Dakota Territory.
Q. Where were you born?
A. On Goose river.
Q. Where is Goose river?
A. North of Fargo.
Q. How far north of Fargo?
A. About 40 miles.
Q. On which side of the Red river of the north?
A. On the Dakota side.
Q. How many miles from Fargo?
A. About 40 miles.
79 Q. What language do you speak?
A. French.
Q. What were the names of your father and mother?
A. Norbrit Peronto & Catherine Peronto.
Q. State, if you know, to what race or nationality your mother belonged; that is, was she a white woman, Indian, or mixed blood?
A. She was a white woman.
Q. What language did she speak?
A. French.

Q. Describe your mother's features; that is, the shape and form of her face.

A. She had a round, smooth face.

Q. Had she high or prominent cheek bones?

A. No, sir.

Q. State the color of her hair, and if anything particular about it.

A. She had fair, curly hair.

Q. Give the color of her eyes.

A. Blue eyes.

Q. The color of her complexion.

A. White face, rosy cheeks.

Q. State whether or not you were acquainted with the general report among your mother's neighbors as to what race or nationality she belonged.

A. Yes, sir.

Q. What was the report?

80 A. She was a white woman.

Q. Was she reputed to be mixed with Indian blood?

A. No; she was a white lady, and had no mixed blood.

Q. Was she ever reputed in the neighborhood to have mixed blood?

A. No, sir.

Q. State whether or not your mother was a white woman.

A. Yes, sir.

Q. State whether or not your mother had any indications of being mixed with Indian blood.

A. No, sir.

Q. Is your mother living or dead?

A. She is dead.

Q. When & where did she die?

A. She died 3 years ago, in Pembina.

Q. Did your mother visit you in Fargo, D. T.?

A. Yes, sir.

Q. State whether or not your father had any trade or occupation?

A. He was a farmer.

Q. Is your father living or dead?

A. He is dead.

Q. Where did he die?

A. In Winnepeg.

81 Q. Was he residing at Winnepeg at the time?

A. He was residing at Pembina, but went to Winnepeg, and died there.

Q. Do you mean Pembina, Dakota?

A. Yes, sir.

Q. State the place of his residence at the time of his death.

A. Pembina.

Q. About how old were you when your father died?

A. About 16.

Q. What language did he speak?

A. French.

Q. State, if you know, to what race or nationality your father belonged—that is, was he a white man, Indian, or mixed breed?

A. He was a mixed breed.

Q. State, if you know, to what extent your father was mixed with Indian blood.

A. About a quarter breed.

Q. State whether or no you ever heard him say he was mixed with Indian blood.

A. Yes, sir.

Q. State, of your own knowledge, whether or not your father belonged to a tribe or band of Indians.

82 A. He did not belong to any band of Indians.

Q. State whether or not you were well acquainted in the neighborhood in which your father lived with the general report as to whether your father at any time ever belonged to any Indian tribe or band of Indians.

A. Yes, sir.

Q. What was the report?

A. He did not belong to any tribe or Indian band.

Q. Did your father at any time ever belong to any Indian tribe or band of Indians?

A. No, sir.

Q. Did your father recognise any rules, custom, or law of any tribe of Indians as governing his acts in the country in which he lived?

A. No, sir.

Q. State whether or not your father recognized the laws of the Territory, State, and of the United States as the law of the land?

A. Yes, sir.

Q. State whether or not you ever made settlement upon the land described in your answer.

A. Yes, sir.

83 Q. State whether or not you built a dwelling upon said land.

A. Yes, sir.

Q. State the size of the dwelling house.

A. 16 x 28 feet.

Q. Of what was it built?

A. A log house.

Q. Did it have a floor?

A. Yes, sir.

Q. If any, state what kind of a roof.

A. A shingle roof.

Q. If any, how many doors & windows?

A. 3 doors and 4 windows.

Q. State the highth.

A. One story.

Q. At what place upon the land described in your answer did you locate your house?

A. On Front street south of the bridge, the railroad bridge near the river in Fargo.

Q. Do you mean the trussel work?
A. Near the trussel work at this end of the bridge.
Q. Do you live in the log house you erected upon the land?
A. No, sir.
Q. Is the log house still standing upon the land?
84 A. Yes, sir.
Q. Is it yours now, as a dwelling-house or otherwise?
A. It is used as a stable now.
Q. Do you still own it?
A. Yes, sir. I own and rent it to a Norwegian man.
Q. How near this log house do you live now; how many paces?
A. About 40 paces.
Q. Is this house, in which you now live, upon the land described in your answer?
A. Yes, sir.
Q. Now, state at what time you built your house. How many years ago?
A. I built the house, finished it, and moved into [it] the 5th of October, ten years ago.
Q. Did you have a family then?
A. Yes, sir.
Q. Of what did your family consist?
A. A wife and six children.
Q. Did you move into the house with your family?
A. Yes, sir.
Q. State whether or not you cultivated any of the land as described in your answer in this case.
85 A. Yes, sir.
Q. State how much you cultivated.
A. About 3 acres.
Q. How many years did you continue to cultivate it?
A. About 9 years. Last year was the first year I did not cultivate it.
Q. State what you planted and raised upon the land.
A. Planted corn, potatoes, cabbages, carrots, beets, onions, cucumbers, and several articles.
Q. State whether or not you raised more than enough to supply the wants of your own family.
A. Yes, sir.
Q. Did you sell any products of the land?
A. Yes, sir; I sold some.
Q. State whether or not you lived upon the land during the whole of the month of May, 1873.
A. Yes, sir.
Q. State whether or not you cultivated the land during the month of May, 1873.
A. Yes, sir.
86 Q. State whether or not you had a crop growing upon the land during the days between the 2nd and the 26th of May, 1873.
A. Yes, sir.

Q. State whether or not you have resided continuously with your family upon the land since Oct., 1871.

A. Yes, sir.

Q. Do you still reside upon the said land?

A. Yes, sir.

Q. State whether or not you settled upon this land in good faith, and with the intention of pre-empting the same.

A. Yes, sir.

Q. State whether or not it was your intention to comply with the pre-emption laws of the United States, and pay for the land.

A. Yes, sir.

Q. State whether or not you was 21 years old and the head of a family when you first settled upon this land.

A. Yes, sir.

Q. State whether or not you were a citizen of the United States at the time you settled upon the land.

87 A. Yes, sir.

Q. State whether or not you ever belonged, or was ever at any time connected with, any tribe or band of Indians.

A. No, sir.

Q. State whether or not you ever allowed yourself to be controlled by any regulations, customs, or laws of any tribe or band of Indians.

A. No, sir.

Q. State whether or not you have always recognized the laws of the Territory or State in which you lived as controlling your actions.

A. Yes, sir.

Q. You say you are a citizen of the United States; now state whether or not you have exercised the rights of a citizen by voting at the general election held in this Territory to elect a delegate to Congress & territorial office-s.

A. Yes, sir.

[Q.] State whether or not you have voted at the city election held in the city of Fargo for the election of city officers.

88 A. Yes, sir.

Q. State whether or not you have been assessed for taxes?

A. Yes, sir.

Q. State whether or not you have paid poll-taxes?

A. Yes, sir.

Q. State whether or not you are the identical Francis Peronto named in and who presented declaratory statement at Pembina, dated July 28th, 1873, covering the land named and described in your answer in which you say that you settled upon said land on the 5th day of October, 1871?

A. Yes, sir.

Cross-examination by Mr. CLOUGH:

Q. What time did your father die?

A. About 38 years ago.

Q. How old were you at that time?

A. About 16 years old.

Q. What kind of a man was your father? Was he an Indian?
A. He had some Indian blood in him.
89 Q. To what nation of Indians?

(Objected to by Maj. Buttz, on the ground that witness had not stated that he belonged to any band of Indians.)

Q. What nation of Indians did your father belong? To what blood?
A. He had some Indian blood, but don't know.
Q. How much Indian blood did your father have?
A. About one-quarter.
Q. How do you know your father had Indian blood?
A. It is what they told me.
Q. Who told you?
A. Everybody round there told me.
Q. Round where?
A. Around my father's.
Q. Where was that?
A. Where we lived around Pembina.
Q. Were there any other Indians around there?
A. There were some.
Q. Was not there a band of Indians up there called The Red Lake and Pembina Band?
90 A. They did not live there. Some of them came there and staid awhile, but most of the time they were out hunting.
Q. Were there not a great many mixed bloods belonging to that band?
A. I don't know.
Q. Were you well acquainted with the band?
A. I have seen them.
Q. Were not the members of that band in the habit of visiting at your father's house; was not your father in the habit of being with Indians frequently?
A. He had no business with them.
Q. Was not your father in the habit of being with them?
A. He never had anything to do with these Indians.
Q. Do you speak any other language except French?
A. Yes, sir.
Q. Speaks what?
A. The Chipp-wa & Cree & Sioux & Assinniboine Indian languages.
Q. Have you not been in the habit of going with the Indians?
91 A. I traveled a great deal in my lifetime; I used to be a trader to go & trade with the Indians.
Q. When did you first learn to speak the Chippewa language?
A. About 20 years ago.
Q. Did you learn any Indian language when you were a boy?
A. No, sir.
Q. Did you learn all the Indian languages after you grew up?
A. I learned them when I began to trade with the Indians.

Q. Do you know of any scrip issued by the U. S. as a mixed blood of the Red Lake and Pembina band of Indians?

(Objected to by Mr. Toomey on the ground that it was not a cross-examination. Objection overruled and question repeated.)

A. I do not.

Q. Do you know Chs. W. McIntire, of St. Paul, for special Indian agent?

A. No, sir; I don't know him.

92 Q. Did you not transfer to Chs. W. McIntire all your rights which you acquired by virtue of the issuance to you by the U. S., as a mixed blood of the Red Lake and Pembina band of Indians, scrip for 160 acres of land?

(Objected to by Mr. Twomey, and objection sustained.)

Q. Did you have any dealings with Chas. W. McIntire, of St. Paul, about some scrip issued for you for 160 acres of land as a mixed blood of the Red Lake and Pembina Indians?

(Objected to by Mr. Twomey on the ground that he had already testified there was none that he knew of. Objection sustained.)

Q. Did you have any conversation with Chas. W. McIntire about scrip issued by the U. S. for members of the mixed blood of the Red Lake and Pembina band of Chippewa Indians?

(Objected to by Mr. Twomey on — ground — immaterial and irrelevant. Objection overruled and witness —.)

A. Never had any business with him, and don't know him at all.

93 Examination by the Court:

Q. Where did your father live, and how long did he live at the place where you were born?

A. I don't know; my father never told me.

Q. Where did your father next live after he left Goose River?

A. My father was at one time a fur-trader; used to hunt and trade for a living, and went from there to Fort Gerrie.

Q. How old were you when he went to Fort Gerrie?

A. I have no idea; I was very young.

By Mr. CLOUGH:

Q. Was your mother a white woman?

A. Yes, sir.

Q. Not an Indian?

A. No, sir.

Q. What was her name before she was married?

A. Catharine Parrasina, and came from Paris.

94 Mrs. Margaret Grant sworn as witness for def't, testifies through Mr. Miller, interpreter.

Examination by Maj. BUTTZ.

Q. State your full name.

A. Margaret Grant.
Q. How old are you, Mrs. Grant?
A. 33 years of age.
Q. State your place of residence?
A. In Fargo.
Q. How long have you lived in Fargo?
A. 4 years.
Q. Where did you live before you came to Fargo?
A. Pembina.
Q. Where is Pembina situated—in Dakota or not?
A. In Dakota; yes, sir.
Q. How long had you lived at Pembina?
A. Ever since I can remember.
Q. Ever since a child?
A. Yes, sir.
Q. State if you are acquainted with Francis Peronto, the def't in this action; and, if so, how long have you been acquainted with him?
A. Ever since my youth. Ever since I can remember.
95 Q. How old were you when you first met him?
A. I was very small.
Q. Where did you first meet him?
A. In Pembina.
Q. Is he now present in court; if so, point him out?
A. Yes, sir (and pointed him out).
Q. State whether or not you were acquainted with his mother?
A. Yes, sir.
Q. What was her given name?
A. Catherine.
Q. State where and when you first became acquainted with the mother of Francis Peronto?
A. In Pembina.
Q. State what language she spoke?
A. French.
Q. Describe her general features—that is, the shape and form of her face.
A. She had a round face.
Q. Had she high or prominent cheek-bones?
A. No.
Q. State if you know the color of her hair, and anything peculiar about it.
A. She had fair, curly hair.
Q. Give, if you know, the color of her eyes.
96 A. She had white rosey cheeks.
Q. Do you remember the color of her eyes?
A. I have forgotten.
Q. State whether or not you ever saw Francis Peronto's mother in Fargo, D. T., visiting him, and, if so, how long ago.
A. She was here 3 years ago.
Q. State how far you lived from her at Pembina.
A. About one acre.

Q. How long did you live that near her?
A. Two years that near; I live near her all the time.
Q. How near; give some idea?
A. Ever since that time and untill they moved up here.
Q. About how many years?
A. About ten years.
Q. Now state if you was acquainted with the general repute among the neighbors in the vicinity where she lived—that is, did they report her Indian, white woman, or mixed blood?
A. Yes, sir; I was acquainted with her.
Q. What was the report?
A. That she was a white woman.
Q. State whether or not she was a *a* white woman.
97 A. Yes, sir; she was.
Q. State whether or not she had any indications of being mixed with Indian blood.
A. No, sir; she had not.
Q. State whether or not you ever heard her say to what race or nationality she belonged.
A. She was French and a white lady.
Q. Did you ever hear Mrs. Peronto say herself to what race or nationality she belonged to?
A. She said she was a white woman.
Q. State whether or not you ever heard Mrs. Peronto say herself where she was born?
A. Never heard her say.
Q. State whether or not you ever heard Francis Peronto's mother say where her son was born.
A. I heard he was born on Goose river.

W. J. BODKIN, a witness called by def't, sworn, testified.

Examined by Maj. BUTTS:

Q. State your full name, please.
A. William J. Bodkin.
Q. Your place of residence?
98 A. Moorhead, Minnesota.
Q. Your occupation?
A. I am sheriff of Clay county, of which Moorhead is the county seat.
Q. Are you acquainted with Francis Peronto?
A. I am.
Q. Is he in court?
A. Yes, sir.
Q. How long have you known him?
A. I have known Peronto, I think, eleven years.
Q. Where did you first make his acquaintance?
A. At McCauleyville.
Q. Where is McCauleyville?
A. About 34 miles south of here.
Q. In Dakota?

A. In Minnesota, just opposite Fort Abercrombie.
Q. When did you first see him in Fargo?
A. I saw him in Fargo the first time in 1871.
Q. Did you see him often?
A. Yes; quite often.
Q. What was your occupation or business there?
A. Contracting. I helped to build the Northern Pacific railroad crossing to Red river here.
Q. What year did you complete that bridge?
A. In 1871 or 1872.
99 Q. Did you know whether Peronto built a house in Fargo about that time; and, if so, state when and where?
A. Yes, sir; he built a log house down there near the bridge.
Q. On what street.
A. On Front street.
Q. How near Front street was it?
A. I should judge it was a couple of rods.
Q. How far south of the R. R. bridge?
A. About ten rods, I should judge.
Q. More than two hundred feet, is not it?
A. Yes, sir.
Q. About how far from the river?
A. About a rod from the bank.
Q. You know that Peronto built that house?
A. Yes, sir.
Q. Did you see him do the work on it?
A. Yes, sir.
Q. Describe the house.
A. It is a log house.
Q. A log house?
A. Yes, sir.
Q. About what size?
A. I should judge somewhere in the neighborhood of 16x24.
100 Q. Do you remember what kind of a roof it has—whether a shingle or board roof?
A. I do not really know.
Q. Did it have a floor in it?
A. Yes, sir; it had a floor in it.
Q. Any windows?
A. Yes, sir; windows and doors.
Q. Was it considered a good comfortable house?
A. Yes, sir.

Cross-examination by Mr. CLOUGH:

Q. The best house in Fargo then, was it not?
A. Yes, sir.
Q. Now state whether you know of your own knowledge whether he had any cultivation in the land, and if so, where?
A. Yes, sir; I have seen cultivation there.
Q. In what years?

A. I think he had quite a crop of potatoes and some corn in 1873.

Q. Do you know whether he cultivated any in 1872?

A. I think he did that spring.

101 Q. You remember as to 1873 positively?

A. Yes, sir.

Q. Do you remember whether he lived in the house in May, 1873?

A. Yes, sir.

Q. Do you know whether he cultivated the land then?

A. Yes, sir.

Q. In what month?

A. I think he had quite a crop in May, 1873.

Q. How many acres?

A. About 3, 4, or 5 acres.

Q. What did he raise?

A. Some corn and potatoes.

Q. Do you know whether he raised more than enough to supply his own family?

A. Yes, and sold some.

Q. Have you been living in Moorhead since 1871?

A. Yes, sir.

Q. Has Mr. Peronto been living on this place since 1871?

A. Yes, sir.

Q. Does he still live here?

A. Yes, sir.

Cross-examination:

By Mr. CLOUGH:

102 Here he brought forth pl'ff's Exhibit One, and pointing to the N. P. bridge.

Q. Now, the bridge you spoke of, was this one crossing the Red River of the North, was it?

A. Yes, sir.

Q. When you finished the bridge about what time of year was it?

A. The abuttments of the bridge were up early in the spring, and a car-load of iron, I think, crossed in June.

Q. How much of the road was graded west when the bridge was completed?

A. I could not tell you, sir.

Q. Were they at work in force then?

A. Yes, sir.

Q. Do you remember how far west it was completed that season *west;* was it not built to the James river in the season of 1872?

A. I think it was, sir?

Q. In its present location?

A. Yes, sir.

Q. Don't you remember that a considerable portion of this work was given out and was under contract which the bridge was being built?

A. I don't real-y remember, but I think some grading had been done the fall before.

103 Q. Do you remember how the iron was brought over the river that was laid from this side west?

A. I think it came over the bridge.

Q. They commenced laying the track as soon as the bridge was done, did they not?

A. Yes, sir.

Q. And they laid iron as far as they graded the road west?

A. Yes, sir.

Q. And that is the present bridge?

A. Yes, sir.

Counsel for def't offered a certified copy of a letter containing two pages from the Department of the Interior, General Land Office, Washington, to the register and receiver of the land office at Pembina, Dakota, dated M'ch 30th, 1871, marked "Def't Exhibit A;" a letter of one page from the register and receiver to the Commissioner of the General Land Office, dated April 22nd, 1872, marked Exhibit B; a letter containing one page from the Secretary of the Interior to the Commisioner of the General Land Office,

104 dated May 26, 1873, and an endorsement thereon, and the *debt* of receipt at the office in Washington, as Exhibit C.

Declaratory statement of Francis Peronto, dated July 28th, 1873, and an endorsement on the back of the same marked Exhibit D: A letter from the register and receiver of the Pembina land office to H. S. Back, dated August 11th, 1873, in so far as it relates to securing the claim of Francis Peronto, as Exhibit E. An appeal by H. S. Back, so far as the same relates to the claim above mentioned—that is, the claim of Francis Peronto—as Exhibit F. A letter from the General Land Office to the Register and receiver, dated Feb. 14, 1874, so far as the same relates to the above-mentioned Peronto claim, as Exhibit G.

An appeal by H. S. Back, so far as the same relates to the claim of Francis Peronto, that is dated September 19, 1874, and marked Exhibit H, and a letter from the Department at Washington to the Register and Receiver, dated Aug. 20, 1873, as Exhibit I.

And now, if your honor please, we will introduce a certified

105 copy of an agreement between the United States and Wahpeton and Sisseton Indians, of Dakota, executed at Sisseton agency, Lake Traverse reservation, Dakota, May 2, 1873, marked Exhibit J. We next introduce a certified copy of the map of the Dakota division of the Northern Pacific railroad, between the Red and the Missouri rivers, showing its definite location; also a copy of a letter accompanying the same, dated Department of the Interior, Washington, D. C., May 26, 1873, written by the Secretary and addressed to Willis Drummond, Commissioner of the General Land Office, as Exhibit K.

L. Delano is the Secretary.

A letter from the Department of the Interior, dated Dec. 8th, was marked Exhibit L.

[On side of folio 105:] This map of location of road is at the order of the court.

It was admitted and agreed by both parties to this action in open court that the surveyor's plat of township 139, range 48, was
106 received and filed in the land office in Pembina, the district in which this land was situated, on the 25th day of July, 1873.

Mr. Clough offered a certified copy of the location of the road as it appears on the map of the local land office and filed In the General Land Office February 21, 1872.

Mr. Toomey objects to the introduction of this certified map, in so far as it relates to the location, so called, February 21, 1872, for the reason that it did not show that it was the definite location of the road as provided by the third section of the act of Congress of July 2, 1864.

The objection was overruled, and map was admitted, and marked Pl'ff's Exhibit B. Mr. Toomey excepting to the ruling of the court.

C. T. HOBART was called as a witness for the pl'ff, sworn and testified:

Examination by Mr. CLOUGH:

107 Q. You may state if you are in the employ of the Northern Pacific R. R. Co.?

A. Yes, sir; I am superintendent of the Dakota division.

Q. In what capacity were you in 1871 & 1872?

A. I was general superintendent from 1869 to 1872.

Q. Now, do you remember when the road was located and graded from the river west on this side?

A. Yes, sir; I remember.

Q. Well, now, will you please state when it was located?

(Objected to by Mr. Toomey as being immaterial. Objection overruled. Excepted to. Examination proceeded.)

Q. Commencing at the west end of the bridge and running west from the town of Fargo, when was the road located?

A. The road was finally located on the 15 of Sept., 1872.

Q. Between what points?

A. They began work there on the west side (pointing to the bridge) on the 15 of Sept., or thereabout; they ran their line west and completed their location on the centre stake, near Jamestown, that fall.

108 Q. When did work commence on the west side?

A. It began in the fall of '71 and was run out to the slough ab't ½ a mile and stop-ed and begun again in April.

Here Mr. Clough produced Exhibit A.

Q. The engineers located west that fall to Jamestown and the graders began to work from the bridge west from the slough. That slough is indicated in this map.

A. Yes, sir.

Q. Was grading completed west of the slough that fall?

A. It was completed with the exception of driving the piles; they were driving the piles then.

Q. About what time did the graders commence in this line?

A. They began in November.

Q. When this line was located it was staked, was it not?

A. Yes, sir.

Q. Do you remember when the iron was brought over the river?

A. It began in 1872; as soon as we got the bridge across
109 the river, the last of May or the first of June we began hauling iron to the west side.

Q. Do remember how far west the road was completed in the year 1872?

A. Yes, sir; we ran trains to Jamestown that fall.

Q. The fall of 1872?

A. Yes, sir.

Q. Continuously from the end of the bridge through to Jamestown?

A. Yes, sir.

Q. Has the same line been in operation ever since?

A. Yes, sir.

FARGO, DAKOTA, *Jan. 16th*, 1882.

The above 38 pages is a true report of the testimony as taken by me in the action entitled the Northern Pacific R. R. Co. *vs.* Francis Peronto, on the 12 day of Jan., A. D. 1882.

E. A. MAYLONE,
Stenographer.

110 "F."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 10, 1882.

I, C. W. Holcomb, Acting Commissioner of the General Land Office, do hereby certify that the annexed copy of the decision of the Secretary of the Interior of December 17, 1881, in the case of Martin Trepp *vs.* The Northern Pacific Railroad Company, is a true and literal exemplification from the original on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] (Sig.) C. W. HOLCOMB,
Acting Commissioner of the General Land Office.

111 DEPARTMENT OF INTERIOR,
WASHINGTON, D. C., *Dec.* 17, 1881.

The Commissioner of the General Land Office.

SIR: On the 25th ultimo I instructed you verbally to suspend the execution of my decision of the 3d of October, 1881, in the case of Martin Trepp *vs.* The Northern Pacific Railroad Company, in order that I might give the case further examination upon the questions of law involved therein.

The decision of October 3, 1881, was simply an affirmance of the decision of your office following the precedent of the Department in the case of Serrano *vs.* Southern Pacific Railroad Company, decided July 2, 1879, (Copp's L. O., vol. 6, p. 93,) and under the circumstances, the main question of law involved did not receive
112 the critical examination and careful consideration that they otherwise would, for to reverse the decision of your office involved the reversal of a rule adopted by my predecessor. Upon a careful re-examination of the case, however, I am convinced that the rule in the Sorrano case was erroneous, and hence, that it was an error to hold that the failure of Tripp to file his declaratory statement for the land in contest within the statutory period, and the intervention of the withdrawal from said Northern Pacific Railroad Company, after the expiration of said period and before Tripp filed, worked a forfeiture of the latter's claim.

The material facts are that plat of township embracing tract in question was filed in local office at Helena, Montana, September 18, 1869; that he was a qualified settler; that he filed declara-
113 tory statement for said tract July 3, 1878, more than three months after settlement (sec. 2265 R. S.); that he proved up his claim and entered the land August 10, 1878; that it is found, and as I understand, it is not questioned, that Tripp performed all the requirements of the pre-emption laws, except as to filing in time, and that with this exception his claim is valid in all respects; that the tract is within the limits of a withdrawal made under authority of said act of 1864, (13 Stats., 365,) for the benefit of said company by letter of the Commissioner of the General Land Office, by direction of the Secretary, under date of April 22, 1872, received at local office May 6, 1872, upon map of general rout- filed with the Secretary and approved by him February 21, 1872; that this letter withdrew the odd sections within the forty-mile limits on each side of the line of the general rout-; that the tract is within
114 the forty-mile or granted limits, as shown by said map of general route on file in the General Land Office, upon which the withdrawal was made, and that the road opposite the land has not been definitely located.

Of course it will be admitted that the title to land within this withdrawal has not absolutely vested in the company beyond revocation by Congress whenever the line of the road has not been definitely located and constructed (see section- 376 and 20, act of July, 1864, 13 Statutes, 366), and it is not certain that the road will ever be definitely located or built over the line of the general route, but it is a fact that no change of route has been made, and that the withdrawal of 1872 remained intact and in full force; hence it must be assumed that the company claims all rights to which it is entitled by virtue of the filing of the map of general route and
115 the withdrawal in accordance therewith.

The case should, therefore, be tried as if the company had a valid claim to such odd sections within the granted limts as are not excepted from the grant; in other words, that all rights intended by

the act of 1864 to be secured to the company upon the filing of a map of general route remain unimpaired.

The six section of the granting, act of July, 1864, (13 Stats., 369,) provides as follows: "That the President of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, * * * and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided in this act, *but*
116 *the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights,* and the acts amendatory thereof, * * * shall be, and the same are hereby, extended to *all the other lands* on the line of said road, when surveyed, *excepting those hereby* granted to said company."

I have underscored words above which seem to me to have significant bearing upon the question in the case.

First observation upon this section is that, while it does not in terms direct the Secretary of the Interior to withdraw lands for the benefit of the company, the duty and authority to do so are clearly implied. The map of general route being filed, the lateral limits of the grant thereby appear.

The odd sections granted by the act are not thereafter liable to a sale, entry, or pre-emption. There is no way, therefore, to
117 prevent disposal or entries of the granted land, except by giving notice of the limits of the grant and directing the local officers to make no disposition of the granted lands within those limits. It has been held by the Department that upon acceptance of map of general route by the Secretary a withdrawal of the odd sections took place, *to instanti,* by force of the sixth section of the statute itself. (Copp's S. L., page 337.) Nevertheless, orders of withdrawal were deemed necessary to avoid confusion and to protect both settlers and the company, and there can be no question of the authority to make such withdrawal.

If, however, any question that executive authority existed to make the withdrawal of April 22, 1872, arises in the mind of any one, reference to section 2281, R. S., and to the decision of the
118 Supreme Court in Walcot *vs.* Des Moines Co., 5 Wall., 681, will settle it affirmatively.

This certainly put- the case on its firmest grounds in favor of the company, and, in my opinion, on the correct basis.

Now, let us see whether the company has any just claim of right to Trepp's land, or whether Trepp's entry ought to be canceled, by reason of anything in said act of July, 1864, or the recited proceedings thereunder.

In the first place, the Legislative withdrawal, which occurred upon the acceptance of the map of general route, February 21, 1872, or the Executive withdrawal of April 22, 1872, embraced and attached only to the odd sections "granted" by act of 1864. The withdrawal was limited to such by the express language of the sixth section:

"And the odd sections of land hereby granted shall not be
119 liable to sale," etc., and the provisions of the pre-emption law "shall be, and the same is hereby, extended; all other lands on the line of said road, when surveyed, excepting those hereby granted to said company," is the language of the act.

There was no Legislative withdrawal and no authority for Executive withdrawal, therefore, of other lands than those granted by the act.

It follows that the right of pre-emption could not be denied to any "other lands on the line of said road when surveyed."

Now, it is obvious that the withdrawal was to protect the company and to preserve to it all the lands to which its right might attach and vest upon definit- location (Copp., L. L., No. 400, page 377).

What those lands are the third section of the act specifies.
120 They are every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States * * * whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

Clearly the object of Congress as expressed in the act was to withdraw the lands intended to be granted upon the filing of the map — general route, so that they should maintain their existing status

from the time of withdrawal to the time of filing map of defi-
121 nite location. Hence the condition of the land at date of withdrawal will determine whether it was granted or intended to be granted or not. And the withdrawal would attach to such lands only as, maintaining the same status to time of definite location, would pass to the company under the grant. Now, if there was a pre-emption claim (not since abandoned) attaching to the land in question at the date of withdrawal, it excluded the land from the withdrawal and from the grant as effectually as if the map of definite location had been filed and accepted at the same time as and instead of the map of the general route.

Tripp's was such a claim, unless his failure to file in time defeated it. That such a failure on unoffered land does not defeat nor forfeit

a pre-emption claim, except in case wherein an another settler
122 on the same tract has filed and otherwise complied with the conditions of the law, seems to me to be as firmly settled by the Supreme Court and this Department as it is possible to settle anything, as will presently be shown.

But if it were an original proposition such would necessarily be the conclusions. Section 2265, R. S., provides that every claimant under the pre-emption law for unoffered land shall make known his claim in writing to the register of the proper land office within three months from settlement, etc. "Otherwise his claim shall be forfeited, and the tract awarded to the next settler in order of time, on the same tract of land, who has given such notice and otherwis e

complied with the conditions of the law." Section 2282, R. S., provides that nothing contained in the chapter relative to pre-emptions shall delay the sale of any of the public lands beyond the
123 time appointed by the proclamation of the President.

Now, when it is considered that unoffered land cannot be entered at private entry by sale, and that settlement without filing within the time mentioned in section 2265 will not debar another settler from appropriating the land, nor the Government from selling it at public sale, there can be no possible reason for forfeiting a pre-emption claim because of failure to file in time, nor for giving to section 2265 any other construction or meaning than its language clearly imparts; that is, that the claim of a pre-emptor who fails to file his notice of his claim in time "shall be forfeited and the tract awarded to the next settler," etc. By limitation of the language itself the forfeiture and award is to the "next settler."

It is a well-known principal that the law does not favor
124 forfeitures. To give any other construction to section 2265 than its language imparts would be an open violation of this wise rule and principal of law.

It might be urged that this limitation would restrict the forfeiture and award to a pre-emptor settler, but such does not appear to be the law; for in the first place, the section does not so express it, and in the next place section 2289, R. S., relative to homesteads, makes lands that are subject to pre-emption subject to homestead entry. But whether the law limits the forfeiture to pre-emption settlers or not is of no consequence in determining this case. If the law is that in case of failure to file declaratory statement in time the claim is forfeitable, and in the tract subject to award only to a pre-emptor, let it be so administered. The Executive duty is to execute the law. The responsability for the law is with the law-making power.

125 Again, section 2281, R. S., provides that "all settlers on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them, but that — shall file the proper notices of their claims and make proof and payment as in other cases." This section was taken from the act of the 27 of March, 1854 (10 Stat's, 269), as amended by the second section of the act of July 14, 1870 (16 Stat's, 279).

All I desire to remark upon the acts of 1854 and 1870 is that they were in force at the time of the grant to the company and when the land was withdrawn; that Trepp is undoubtedly
126 entitled to their provisions, as well as to the provisions of section 2281, R. S., and that all that section requires is that the settler shall file and make proof and payment as in other cases.

It follows, therefore, that if a failure to file or make proof and payment in time works no forfeiture of a claim in the absence of another subsequent settler on the same tract in other cases, it cannot, under the act of 1854, as amended, and section 2281, which were unquestionably enacted for the protection of settlers' claims and not

for their distinction. But this question was clearly and positively settled by the Supreme Court in a case of Johnson *vs.* Towsley (13 Wall., 72). That case has been so often referred to and quoted from and applied in decisions of this Department that it would seem supererogation to do more than refer to it, but I feel constrained
127 to call attention to certain facts therein.

Towsley settled June 15, 1858, and filed declaratory statement February 4, 1859. Johnson filed declaratory statement October 5, 1860, for same land. On September 20, 1862, the local officers allowed Towsley's entry and issued patent certificate.

Finally, upon appeal to the Secretary of the Interior, a decision was rendered July 11, 1863, in favor of Johnson. Afterwards Johnson entered the land and received a patent therefor. Upon *this* facts the Court upheld Towsley's title, and declared that Johnson, who was held to be the trustee of Towsley, should convey the title which passed by patent to Towsley. I need not refer specially to the opinion of the Court upon the question of the failure of Towsley to file in time. They held that it did not defeat his claim,
128 because no other person settler on the same tract had given the notice, etc., before Towsley filed.

But I desire to draw attention specially to the fact that the court held that Towsley's claim was a valid pre-emption claim, notwithstanding his failure to file in time, which point was fully considered, and being a valid claim, which means that Towsley had made compliance with the law as the court construed it, the court decreed the title in him.

Now, let me ask what is it that is excepted from the grant of the Northern Pacific Railroad Company? What is carved out of the grant by express language? What conditions is land in which cannot pass under the grant? What, by every intendment of the act, should not pass by the grant?

129 The answer comes from the very language of *of* the third section of the act itself. Land, odd sections, to which a pre-emption claim attaches when the same is withdrawn for the benefit of the road, or at definite location, as above shown, cannot pass under the grant if the claim is not abandoned.

The land, in other words, must be "free from pre-emption or other claims or rights."

According to Johnson *vs.* Towsley, Tripp had a pre-emption claim at the time of withdrawal.

It is not a question whether or not the company is an adverse claimant, and whether the intervention of its claim works a defeat or forfeiture of Tripp's pre-emption, as in the case of the subsequent setlter who has given notice, etc.

The real question is whether the claim of Tripp does not bring the tract within the exception to the grant; and under the
130 doctrine of Johnson *vs.* Towsley, it clearly does, and the same doctrine was maintained in Fansdale *vs.* Daniels (10 Otto., 117). Another view is that as between the United States and the company the grant is construed more favorably to the Government and strictly as to the company. (Leavenworth, &c., Railroad Com-

pany *vs.* The United States, 2 Otto., 733.) Hence instead of attempting, by strained interpretations of the opinions in Johnson *vs.* Towsley and Lansdale *vs.* Daniels, to avoid applying the rule that failure to file for more than three monthly will not of itself render a claim invalid, the doctrine of those cases should be applied in the sense in which it plainly appears in said opinions.

Yet even in this view of the case the only hardship upon the Company will be the selection of other land in lieu of that
131 claimed by Tripp; the grant is not necessarily diminished.

The department at an early day adopted the doctrine of Johnson *vs.* Towsley and applied it in cases similar to the one under consideration.

There is an unbroken line until we reach case of Serrano *vs.* The Southern Pacific R. R. Co. (Copp's L. C., vol. 6, page 93). In that case it will be seen that the Secretary found, leaving out of view the question of *laches* in filing, that Mrs. Serrano had no pre-emption claim when the *the* right of the company attached. That was sufficient to defeat her case and to award the land to the company.

The reasoning, after rejecting the claim upon the facts, does not seem to me, after careful consideration thereof, to overcome that of the court in the cases cited, not the evident intent of sections
132 2265, 2281, and 2282 of the Revised Statutes, nor to my mind does it afford sufficient ground for setting aside a rule that had prevailed in the department since January 10, 1872, at least. (Walker & Walker, Copp's L. L., p. 293.)

The Department, prior to the Serrano case, had not only held that a failure to file in the absence of an adverse settler's claim did not defeat a pre-emption claim, but it had also held, by analogy of reasoning, that a failure to prove up within the time required would not defeat a claim. I here refer to some of the decisions in which the Department has applied the Johnson *vs.* Towsley doctrine, either directly or analogously, and on examination of them will show how firmly that doctrine was adopted as of law for the guidance of the Land Department: Walker & Walker, above cited;
133 Erastus Kimball (Copp's L. L., 295); Shwerin *vs.* W. T. R. R. Co. (Copp's L. L., p. 409). This case was decided Feb 9, 1872. Fitzgerald *v.* W. P. R. R. (Copp's L. C. 2, page 51, exactly in point); Duffy *vs.* N. P. R. R. Co. (Copp's L. C., vol. 2, p. 51, exactly in point); Whitaker *vs.* S. P. R. R. Co. (Copp's L. O., vol. 2, 119, exactly in point); Watson *vs.* Mo. Riv., Ft. Scott and Gulf R. R. Co. (Copp's L. O., vol. 3, page 7); Barns *vs.* St. Jo. & Denver City R. R. Co. (Copp's L. O., vol. 4, p. 132); So. Pac. R. R. Co. *vs.* Wiggins *et al.* (Copp's L. O., vol. 4, p. 123); Cox *vs.* So. Pac. R. R. Co. (Copp's L. C., vol. 6, p. 35).

Now, Tripp's claim being valid at date of withdrawal, there is no inhibition in the act of 1864 against allowing his entry after the withdrawal, because (1) it is not one of the tracts withdrawn, and (2) the sixth section of the act of 1864 specifically provides
134 that the provisions of the pre-emption law shall extend to all lands along the line of wood except those granted to the

company, and (3) section 2281 also provides for the allowance of the entry.

The decision of this Department of October 3, 1881, is hereby recalled and set aside, that of your office of January 22, 1881, reversed, and the entry of Tripp held for patent and not for cancellation.

Very respectfully,

S. J. KIRKWOOD, *Secretary.*

Vol. 395.

135 *Decision.*

TERRITORY OF DAKOTA, *Cass County:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
FRANCIS PERONTO, Defendant.

This cause came on for trial before the court without a jury (a jury trial having been duly waived in open court by the parties) at the general, December, term, and the said cause having been tried, the court hereby makes its finding of fact, and its conclusions of law thereon, as follows, to wit:

I.

The plaintiff is a corporation organized and existing under that certain act of Congress, approved July 2, A. D. 1864, enti-
136 tled "An act making a grant of lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and under the subsequent acts and joint resolutions of Congress relating to the same subject-matter. In and by the said act of July 2, A. D. 1864, it was, among other things, provided and enacted as follows—that is to say:

"SEC. 2." * * * "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operations of this act, and acquired in the donation to the (road) named in this bill."

"SEC. 3. And it be further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors, and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side [of] said railroad wherever it passes through any State, and whenever, on the line thereof, the United States have full title, not

reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in
137 the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided further, That the railroad company receiving the previous grant of land may assign their interest to the said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided further, That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within fifty miles thereof may be selected as above provided: And provided further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said 'Northern Pacific railroad.'

"SEC. 4. And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready
138 for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said railroad and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands as aforesaid shall be issued to said company confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road; and from time to time whenever twenty-five additional consecutive miles shall have been constructed, complete, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid: Provided, That no more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company, for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as first-class railroad, from the place of beginning, on Lake Superior, to the western boundary of Minnesota: Provided also, That lands shall not be granted under

the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act.

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in
139 width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company; and the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale."

II.

Some time in the fall of the year 1871 the said Northern Pacific Railroad Company, acting under and in pursuance of the said several acts and joint resolutions of Congress, entered and commenced work upon that part of its said line of railroad beggin-ing on the western bank of the Red River of the North and extending westwardly through and across what was shown by the survey to be the section of land mentioned and described in the pleadings, that is to say, section numbered seven (7), in township numbered one hundred and thirty-nine (139), of range numbered forty-eight (48). During the same fall the said railroad company caused all the said part of its said line of railroad, as the same has been located as aforesaid, to be graded and prepared for the superstructure thereof. In
140 the month of June of the year 1872 the said railroad company caused the superstructure of the said railroad to be put upon the said grading and the iron rails thereof to be laid down upon the same, and fully completed all that part of the said railroad running over and across the said section, and ever since that time the said railroad has been maintained and operated over and across the said section, as the same was fixed and located in the year 1871.

III.

Acting under and in pursuance of the said acts and joint resolutions of Congress the said Northern Pacific Railroad Company, in the month of February, A. D. 1872, filed in the office of the Secretary of the Interior of the United States a map showing all that part of the general route of its said railroad beginning at the westerly bank of the Red River of the North and extending westwardly to the James river, in this Territory. All that part of the said general route beginning on the westerly bank of the Red River of the North and extending as far westwardly as the west line of the said section

of land was identical with the said location thereof made in the year 1871.

IV.

After the filing of the said map showing the said portion of the general route of the said railroad, as aforesaid, and on March 30, A. D. 1872, W. W. Curtis, then the Acting Commissioner of the General Land Office of the United States, in his official capacity, made out and forwarded to the register and receiver of the local
141 land office of the Pembina land district, in which district the said section of land was then situated, a letter of instructions, whereof a true copy is as follows, that is to say:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1872.

Register and receiver, Pembina, D. T.

GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific Railroad, under act of July 2nd, A. D. 1864, and, by direction of the Secretary of the Interior, you are directed to withhold from sale or location, pre-emption, or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated on this map. You will also increase in price to $2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability, and under the pre-emption and homestead laws only. No private entry of the same being admissible until these lands have been offered at the increased price. This order will take effect from the date of its receipt by you, and you are requested to acknowledge, without delay, the time of its receipt.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

The said letter was received, together with the diagram therein referred to, by the register and receiver of the said Pembina land office, on April 20, A. D. 1872. The said diagram represented the route of the said railroad as passing over and across the said section of
142 land. No evidence was adduced to the court tending to show that any of the directions or instructions contained in the said letter were ever withdrawn or modified by competent authority; and I therefore find that the said directions and instructions have remained in force continuously since the 20th day of April, A. D. 1872.

V.

On May 26th, A. D. 1873, the said Northern Pacific Railroad Company filed in the office of the Secretary of the Interior of the United States a map showing the definite location of that part of its said line of railroad extending from the westerly bank of the Red River of the North to the easterly bank of the Missouri river.

All that portion of the said definite location shown upon the said map extending from the westerly bank of the Red River of the North as far west as the west line of the said section of land was the same location thereof made in the year 1871, as hereinbefore mentioned.

After the filing of the said map, and on June 11, A. D. 1873, the said Acting Commissioner of the General Land Office of the United States made out and forwarded to the register and receiver of the said Pembina land office a further letter of instructions, whereof a true copy is as follows, that is to say:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Register and receiver, Pembina, Dakota Territory.

GENTLEMEN: The Northern Pacific Railroad Company filed in this office, on the 26th ult., in accordance with law, a map of the definite location of their road from the Red River of the
143 North to the Missouri river, in Dakota Territory. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the forty-mile limits of withdrawal ordered by my letter to you of March 30th, 1872, upon a designated line; and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold, subject to pre-emption and homestead entry only, the even-numbered sections, at $2.50 per acre, within the forty-mile limits, and $1.25 per acre between the forty and fifty mile or indemnity limits. The even-numbered sections within the forty-mile limits of the former withdrawal, now falling without the present corrected limits, will be reduced in price to $1.25 per acre. The right of the road attaches to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even sections become double minimum. Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

The said letter, together with the map therein referred to, was received by the said register and receiver of the Pembina land office on June 24, A. D. 1873.

VI.

On February 19, A. D. 1867, the said section of land formed
144 part of the country recognized by the Government of the United States as being in the possession and occupancy of the Wahpeton and Sisseton bands of Indians, by the treaty concluded on the date last mentioned between the said Government and the said bands of Indians, but the said section never formed any part of the territory specifically reserved to the said bands by the terms

of the said treaty. The right of occupancy of the said bands of Indians, in respect to the said country, including the said section of land, as recognized by the said treaty, continued until May 2, A. D. 1873, when such right was ceded and surrendered by the said bands to the United States by an agreement between said bands and certain commissioners of the United States, acting under authority of the laws thereof, which agreement, after the conclusion thereof, was ratified and confirmed by that certain act of Congress, approved June 22, 1874, entitled "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, 1875, and for other purposes." After the conclusion of the said agreement, and on —, A. D. 1873, the Government of the United States caused to be filed in the said Pembina land office plats showing surveys of portions of the said Indian country, in which surveys was embraced the said section of land in the pleadings described.

VII.

The defendant, Francis Peronto, is a native citizen of the United States, and as such citizen, having then and there the qualifica-
145 tions of a pre-emptor, on October 5, A. D. 1871, entered upon the said section of land, which was then unsurveyed, and erected a dwelling-house upon that portion of the same described in the complaint in this suit, and took up his abode in said house, where he has ever since continued to reside; and he improved three or four acres of the land in the vicinity of said house by breaking the same up and cultivating the same, and had a crop growing and cultivated same during May, 1873. The defendant so entered upon the said land with a view and purpose of making a pre-emption of the same, under the laws of the United States; but, as the said lands and the other lands in the vicinity were unsurveyed at the time of such entry, it is impossible, from the evidence, to determine what particular subdivision or subdivisions of the said section the defendant proposed to pre-empt until the time of the making out by him of the declaration of intention to pre-empt, hereinafter mentioned. On July 28, 1873, the defendant made and signed, and on August 11, 1873, he presented, his declaratory statement to the register and receiver of the said land office, declaring his intention to claim the north half ($\frac{1}{2}$) of the northwest quarter ($\frac{1}{4}$) and the northwest quarter ($\frac{1}{4}$) of the northeast quarter ($\frac{1}{4}$), and lot one (1) of the said section as a pre-emption right, under the act of September 4, 1841, and alleging settlement October 5, 1871; which declaratory statement was filed within three (3) months after the filing of the township plat showing the Government survey of the said land.

The register and receiver of the said land office, to whom
146 the said declaratory statement was tendered, declined to accept the same, and refused to file the same, for the reason that the lands therein described were not subject to pre-emption, because the said railroad company had acquired the right to have

the same conveyed to it by the United States, under and by virtue of the said acts and joint resolutions of Congress.

The said defendant thereupon duly appealed from the decision of the said register and receiver to the Commissioner of the General Land Office, who, on or about February 14, A. D. 1874, approved and affirmed the said ruling of the said register and receiver.

The defendant, therefore, further appealed from the decision of the said Commissioner to the Secretary of the Interior, who, on September 19th, A. D. 1874, affirmed the decision of the said register and receiver, and of the said Commissioner.

From the above I find, as conclusions of law:

I. That the plaintiff in the suit, in consequence of the said acts of Congress and ruling of the said several officials of the United States, prior to the commencement of this action, had acquired from the United States the legal title to the lands described in said declaratory statement; of which lands the parcel of ground described in the complaint forms part.

II. That the plaintiff was, at the time of the beginning of this action, the owner and entitled to the immediate possession of the parcel of ground described in the complaint; that the defend-
147 ant was wrongfully in the possession thereof; and that the defendant has no interest in or claim upon the lands described in the answer in this suit.

Let judgment be entered accordingly.

Dated April 14, 1882.

S. A. HUDSON, *Judge.*

The defendant excepts to the foregoing findings of facts, conclusion of law, and order of court, directing judgment to be entered.

April 14, 1882.

C. W. BUTTZ,
TWOMEY & FRANCIS,
Attorneys for Defendant.

148 District Court.

TERRITORY OF DAKOTA, *Cass County:*

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
ag'st
FRANCIS PERONTO, Defendant.

This cause came on to be tried at the term of said court beginning on the 6th day of December, A. D. 1881, and a jury having been waived in open court and by both parties, and the cause having been tried by the court without a jury, the court duly made its findings of facts, and its conclusion of laws thereon, awarding and directing that the plaintiff have judgment against the defendant for the recovery of the possession of the premises described in the complaint.

Now, therefore, it is adjudged, and the court doeth hereby adjudge, that the plaintiff recover from the defendant the possession of the premises described in the complaint, that is to say, all and singular that parcel of land situated in the county of Cass and Territory

aforesaid, to be known as that part now occupied by the de-
149 fendant of the northeast corner of lot one (1), of the north-
east quarter (N. E. ¼) of section seven (7), township one hundred and thirty-nine (139), of range forty-eight (48), and south of the right of way of the Northern Pacific Railroad Company, and east of the lots owned by Harry O'Neil east of Firth street, of Fargo, the same being within the city of Fargo and Territory of Dakota;

And it is further adjudged that the plaintiff recover from the defendant the sum of ten dollars, the plaintiff's costs and disbursements in this suit.

Dated Fargo, D. T., this 19th day of July, A. D. 1882.

S. A. HUDSON, *Judge.*

150 *Judgment.*

TERRITORY OF DAKOTA, *Cass County:*

District Court.

THE NORTHERN PACIFIC RAILROAD COMPANY, Pl'ff,
vs.
FRANCIS PERONTO, Def't.

151 *Motion for New Trial.*

TERRITORY OF DAKOTA, *County of Cass:*

In the District Court, 3d Judicial Dist.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
FRANCIS PERONTO.

Now comes the defendant, by C. W. Buttz and Toomey & Francis, his attorneys, and now moves for a new trial herein on the grounds—

1st. That the court erred in its conclusions of law.

2nd. That the court erred in its findings of facts.

3d. That the findings of the court are contrary to the law and the facts.

C. W. BUTTZ,
And TOOMEY & FRANCIS,
Atty's for Def't.

152 *Motion for a New Trial.*

TERRITORY OF DAKOTA, *County of Cass:*

In the District Court, 3d Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
FRANCIS PERONTO.

I accept due and legal service of the within motion for new trial herein.

W. B. McCONNELL,
Att'y for Pl'ff.

153 *Notice of Motion for New Trial.*

TERRITORY OF DAKATO, *County of Cass:*

In the District Court, 3d Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY

vs.

FRANCIS PERONTO.

You, the plaintiff in the above-entitled action, are hereby notified that the defendant will, on the 28th day of March, A. D. 1882, at 10 o'c. a. m. of said day, move the court for a new trial in this cause. A copy of said motion is herewith served.

Fargo, D. T., March 18, 1882.

C. W. BUTTZ AND
TWOMEY & FRANCIS,
Att'ys for Def't.

154 *Notice of Motion for a New Trial.*

TERRITORY OF DAKOTA, *County of Cass:*

In the District Court, 3d Judicial District.

THE NORTHERN PACIFIC RAILROAD COMPANY

vs.

FRANCIS PERONTO.

I hereby accept due and legal service for the plaintiff of the within notice of a motion for a new trial.

WM. B. McCONNELL,
Att'y for Pl'ff.

155 *Notice of Appeal.*

TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,

vs.

FRANCIS PERONTO, Defendant.

Take notice that the defendant in the above-entitled cause hereby appeals to the supreme court of the Territory from the judgment and orders therein made and entered in said district court on the

14th day of July, 1882, in favor of the plaintiff and against said defendant, and from the whole thereof.

C. W. BUTTZ, *Att'y.*
TWOMEY & FRANCIS,
For Counsel.

To the clerk of the district court in and for Cass county, in said third judicial district, and W. B. McConnell.

Due service of the within accepted.
July 25th, 1882.

W. B. McCONNELL,
Att'y for Pl'ff.
GEO. C. FOSTER, *Clerk,*
By N. C. MORGAN, *Deputy.*

156 *Bill of Exceptions.*

TERRITORY OF DAKOTA, *County of Cass:*

District Court, Third Judicial District.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
FRANCIS PERONTO, Defendant.

Be it remembered, that at the general December term of said court and on the 4th day of April, 1882, this cause coming on for trial before the court without the intervention of a jury on the issue joined therein, the plaintiff, to sustain the issues on its part, offered to introduce in evidence a certified copy of the location of its road, as it appeared on the map of the local land office and filed in the General Land Office, February 21st, 1872. The defendant objected to the introduction of said certified copy of map in evidence, in so far as it related to the location of plaintiff's road, for the reason that it does not show that it is a map or plat of the definite location thereof as provided by the third section of the act of Congress granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific co-st,
157 by the northern route, approved July 2nd, 1864, which objection the court overruled, the court admitting said certified copy of map in evidence, to which ruling the defendant at the time duly excepted.

And be it further remembered that upon the further trial of said cause the plaintiff, to sustain the issues on its part, introduced C. T. HOBART as a witness, who, being sworn, testified as follows:

Question. You may state if your are in the employ of the Northern Pacific Railroad Company.

Answer. Yes, sir. I am superintendent of the Dakota division.

Question. In what capacity were you in 1871 and 1872?

Answer. I was general superintendent for 1869 to 1872.

Question. Now, do you remember when the road was graded and located from the river west on this side?

Answer. Yes, sir; I remember.

Question. Well, now, will you state when it was located?

Question objected to by defendant, for the reason that it was immaterial. Objection overruled and witness testified. To which ruling the defendant at the time excepted.

Answer. On the 15th of September, 1872.

This being all the evidence introduced over defendant's objections, defendant asks the court to sign this bill of exceptions and make the same part of the record in this case; which accordingly is done.

S. A. HUDSON, *Judge.*

158 *Bill of Exceptions.*

TERRITORY OF DAKOTA, *County of Case:*

District Court, Third Judicial District.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
FRANCIS PERONTO, Defendant.

Be it remembered that at the general December term of said court and on the 14th day of April, 1882, the court, after hearing the evidence and argument of council, presented and filed its findings of facts and conclusions of law as follows, to wit:

Decision.

TERRITORY OF DAKOTA, *Cass County:*

District Court.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff,
against
FRANCIS PERONTO, Defendant.

This cause came on for trial before the court without a jury (a jury trial having been waived in open court by the parties) at the general December term, and the said cause having been tried, the court hereby makes its findings of facts and its conclusions of law thereon as follows:

I.

The plaintiff is a corporation organized and existing under that certain act of Congress approved July 2, A. D. 1864, entitled
159 "An act making a grant of lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and under the subsequent acts and joint resolutions of Congress relating to the same subject-matter. In and by the said act of July 2d, A. D. 1864, it was, among other things, provided and enacted as follows, that is to say:

"SEC. 2. * * * The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said

Indians the Indian titles to all lands falling under the operation of this act and acquired in the donation to the (road) named in this bill."

"SEC. 3. And it be further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on side [of] said railroad wherever it passed through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed and a plot thereof filed in
160 the office of the Commissioner of the General Land Office, and whenever, prior to the said time, and of said sections or part of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: Provided, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amounted granted by this act: Provided further, That the railroad company receiving the previous grant of land may assign their interest to said 'Northern Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: Provided further, That all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest to the line of said road, and within fifty miles thereof, may be selected as above provided. And provided further, That no money shall be drawn from the Treasury of the United States to aid in the construction of said 'Northern Pacific railroad.'

"SEC. 4. And be it further enacted, That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecu-
161 tive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said railroad and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and pat-

ents of lands as aforesaid shall be issued to said company, confirming to said company the right and title to said lands situated opposite to, and coterminous with, said completed section of said road, and from time to time whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patent shall be issued to said company conveying the additional sections of land as aforesaid: Provided, That no more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company, for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order as a first-class railroad, from the place of beginning on Lake Superior, to the western boundary of Minnesota: Provided also, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

SEC. 6. And be it further enacted That the President of the United States shall cause the lands to be surveyed for forty miles in
162 width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "an act to secure homesteads to actual settlers on the public domain, approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company; and the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre when offered for sale."

II.

Some time in the fall of the year 1871, the said Northern Pacific Railroad Company, acting under, and in pursuance of the said several acts and joint resolutions of Congress, entered and commenced work upon that part of its said line of railroad, beginning on the western bank of the Red river of the North, and extending westwardly through and across what was shown by the survey to be the section of land mentioned and described in the pleadings, that is to say, section numbered seven (7), in township numbered one hundred and thirty-nine (139), of range number forty-eight (48). During the same fall the said railroad company caused all the said part of its said line of railroad, as the same had been located as aforesaid, to be graded and prepared for the superstructure
163 thereof. In the month of June, of the year 1872, the said railroad company caused the superstructure of the said railroad to be put upon the said grading, and the iron rails thereof

to be laid down upon the same, and fully completed all that part of the said railroad running over and across the said section, and ever since that time the said railroad has been maintained and operated over and across the said section, as the same was fixed and located in the year 1871.

III.

Acting under and in pursuance of the said acts and joint resolutions of Congress, the said Northern Pacific Railroad Company, in the month of February, A. D. 1872, filed in the office of the Secretary of the Interior of the United States, a map showing all that part of the general route of its said railroad, beginning at the westerly bank of the Red River of the North, and extending westwardly to the James river, in this Territory. All that part of said general route beginning on the westerly bank of the Red River of the North and extending as far westwardly as the west line of said section of land, was identical with the said location thereof made in the year 1871.

IV.

After the filing of the said map, showing the said portion of the general route of the said railroad as aforesaid, and on March 30, A. D. 1872, W. W. Curtis, then the Acting Commissioner of the General Land Office of the United States, in his official capacity, made out and forwarded to the register and receiver of the local land
164 office of the Pembina land district, in which district the said section of land was then situated, a letter of instructions, whereof a true copy is as follows; that is to say:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1972.

Register and Receiver, Pembina, D. T.

GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific railroad, under act of July 2nd, A. D. 1864, and, by direction of the Secretary of the Interior, you are directed to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated on this map. You will also increase in price to $2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability, and under the pre-emption and homestead laws only; no private entry of the same being admissible until these lands have been offered at the increased price. This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

The said letter was received, together with the diagram therein referred to, by the register and receiver of the said Pembina land

office on April 20, A. D. 1872. The said diagram represented the route of the said railroad as passing over and across the said sec-
165 tion of land. No evidence was adduced to the court tending to show that any of the directions or instructions contained in the said letter were ever withdrawn or modified by competent authority, and I therefore find that the said directions and instructions have remained in force continuously since the 20th day of April, A. D. 1872.

On May 26th, A. D. 1873, the said Northern Pacific Railroad Company filed in the office of the Secretary of the Interior of the United States a map showing the definite location of that part of its said line of railroad extending from the westerly bank of the Red River of the North to the easterly bank of the Missouri river.

All that portion of the said definite location shown upon the said map, extending from the westerly bank of the Red River of the North as far west as the west line of the said section of land, was the same location thereof made in the year 1871, as hereinbefore mentioned.

After the filing of said map and on June 11, A. D. 1873, the said Acting Commissioner of the General Land Office of the United States made out and forwarded to the register and receiver of the said Pembina land office a further letter of instructions, whereof a true copy is as follows; that is to say:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

Register and Receiver, Pembina, Dakota Territory.

GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26th ult., in accordance with law, a map of the definite locations of their road from the Red River of the
166 North to the Missouri river, in Dakota Territory. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty-mile limits of their land grant along said line, with also the forty-mile limits of withdrawal ordered by my letter to you of March 30th, 1872, upon a designated line; and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold, subject to pre-emption and homestead entry only, the even-numbered sections at $2.50 per acre within the forty miles limits and $1.25 per acre between the forty and fifty-mile or indemnity limits. The even-numbered sections within the forty-mile limits of the former withdrawal, now falling without the present corrected limits, will be reduced in price to $1.25 per acre. The right of the road attached to both surveyed and unsurveyed lands, from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date, also, the even sections become double minimum. Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully,

W. W. CURTIS,
Acting Commissioner.

The said letter, together with the map therein referred to, was received by the said register and receiver of the Pembina land office on June 24th, A. D. 1873.

VI.

167 On February 19, A. D. 1867, the said section of land formed part of the country recognized by the Government of the United States as being in possession and occupancy of the Wahpeton and Sisseton bands of Indians by the treaty concluded on the date last mentioned between the said Government and the said bands of Indians, but the said section never formed any part of the territory specifically reserved to the said bands by the terms of said treaty.

The right of occupancy of the said bands of Indians, in respect to the said country, including the said section of land as recognized by the said treaty, continued until May 2, A. D. 1873, when such right was ceded and surrendered by the said bands to the United States by an agreement between said bands and certain commissioners of the United States, acting under authority of the laws thereof, which agreement, after the conclusion thereof, was ratified and confirmed by that certain act of Congress approved June 22, 1874, entitled "An act making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30th, 1875, and for other purposes."

After the conclusion of the said agreement, and on —— A. D. 1873, the Government of the United States caused to be filed in the said Pembina land office plats showing surveys of the portions of the said Indian country, in which surveys was embraced the said section of land in the pleading described.

VII.

168 The defendant, Francis Peronto, is a native citizen of the United States, and, as such citizen, having then and there the qualifications of a pre-emptor, on October 5, A. D. 1871, entered upon the said section of land, which was then unsurveyed, and erected a dwelling-house upon that portion of the same described in the complaint in this suit, and took up his abode in said house, where he has ever since continued to reside, and he improved three or four acres of the land in the vicinity of the said house by breaking the same up and cultivating the same, and had a crop growing and cultivated same during May, 1873. The defendant so entered upon the said land with the view and purpose of making a pre-emption of the same under the laws of the United States, but, as the said lands and the other lands in the vicinity were unsurveyed at the time of such entry, it is impossible from the evidence to determine what particular subdivision or subdivisions of the said section the defendant proposed to pre-empt until the time of the making out by him of the declaration of intention to pre-empt, hereinafter mentioned.

On July 28, 1873, the defendant made and signed, and on August 11, 1878, he presented, his declaratory statement to the register and

receiver of the said land office, declaring his intention to claim the north half (½) of the northwest quarter (¼), and the northwest quarter (¼) of the northeast quarter (¼), and lot one (1) of the said section as pre-emption right, under the act of September 4, 1841, and alleging settlement October 5, 1871, which declaratory statement was filed within three (3) months after the filing of the township plat showing the Government survey of the said land.

The register and receiver of the said land office, to whom
169 the said declaratory statement was tendered, declined to accept the same, and refused to file the same, for the reason that the lands therein described were not subject to pre-emption, because the said railroad company had acquired the right to have the same conveyed to it by the United States under and by virtue of the said acts and joint resolutions of Congress.

The said defendant thereupon duly appealed from the decision of the said register and receiver to the Commissioner of the General Land Office, who, on or about February 14, A. D. 1874, approved and affirmed the said ruling of the said register and receiver.

The defendant thereupon further appealed from the decision of the said Commissioner to the Secretary of the Interior, who, on September 19th, A. D. 1874, affirmed the decision of the said register and receiver, and of the said Commissioner.

From the above I find as conclusions of law—

1. That the plaintiff in this suit, in consequence of the said act of Congress and rulings of the said several officials of the United States prior to the commencement of this action, had acquired from the United States the legal title to the lands described in the said declaratory statement, of which lands the parcel of ground described in the complaint form part.

II. That the plaintiff was, at the time of the beginning of this action, the owner and entitled to the immediate possession of the parcel of ground described in the complaint; that the de-
170 fendant was wrongfully in the possession thereof, and that the defendant has no interest in or claim upon the lands described in the answer in this suit.

Let judgment be entered accordingly.

Dated April 14, 1882.

S. A. HUDSON, *Judge.*

The defendant excepts to the foregoing findings of facts, conclusions of law, and order of court directing judgment to be entered.

April 14, 1882.

C. W. BUTTZ, TWOMEY & FRANCIS,
Attorneys for Defendant.

That upon filing said findings of fact and conclusions of law the defendant then and there excepted to the findings of fact and conclusions of law, and direction to enter judgment, upon the following grounds, viz:

1. That the court erred in its findings of fact and conclusions of law.

2. That the findings of fact and conclusions of law are contrary to the law and the evidence. Defendant asks the court to sign this, his bill of exceptions, and make the same a part of the record in this case, which is accordingly done.

S. A. HUDSON, *Judge.*

171 TERRITORY OF DAKOTA, } ss:
County of Cass, 3d Judicial District, }

I, Sandford A. Hudson, judge of the district court in and for said district and territory, do certify that the foregoing papers, to wit, summons, complaint, answer, reply, decision of judge, two bills of exception, evidence, and exhibits constitute the judgment roll in the case of N. P. R. R. Co., plaintiff, against Francis Peronto, defendant, and the whole of such judgment roll.

Witness my hand this 29th day of August, A. D. 1882.

S. A. HUDSON,
Judge of said District Court.

172 TERRITORY OF DAKOTA, } ss:
County of Cass, Third Judicial District, }

I, Geo. T. Foster, clerk of the district court within and for the said county of Cass, in the third judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proofs of service thereof, of the judgment roll, and of the certificate of the judge in the above-entitled action, wherein The Northern Pacific Railroad Company is plaintiff and Francis Peronto is defendant, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this 29th day of August, A. D. 1882.

[SEAL.] GEO. T. FOSTER, *Clerk,*
By N. C. MORGAN, *Deputy.*

173 In Supreme Court, Territory of Dakota. October Term, A. D. 1882.

FRIDAY, *October 6th*, A. D. 1882—4th day of Term.

The court being duly opened, the following proceedings, among others, were had, to wit:

Appeal from the District Court of Cass County, 3rd Judicial District.

NORTHERN PACIFIC RAILROAD COMPANY, Respondents,
vs.
FRANCIS PERONTO, Appellant. } No. 122.

And now, this 6th day of October, 1882, the above cause being called in its order on the calendar, *now* comes D. H. Twomey, Esqr., attorney for said appellant, and W. P. Clough, Esqr., for respondent.

Same day cause submitted to the court.

Attest: B. S. WILLIAMS, *Clerk.*

174 *Appeal from the District Court of Cass County.*

THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court. October Term, 1882.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff & Respondent,
vs.
FRANCIS PERONTO, Defendant & Appellant.

This action coming on to be heard at the October, A. D. 1882 term of said supreme court, at the supreme court room, in the city of Yankton, D. T.—present: A. J. Edgarton, chief justice, and G. C. Moody, J. P. Kidder, and S. A. Hudson, associate justices—and an appeal having been argued by D. H. Twomey, Esqr., for the appellant, and by W. P. Clough, Esqr., for the respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Cass county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings, according to law and the judgment of this court.

And it is further considered and adjudged that the plaintiff and respondent have and recover of the defendant & appellant its costs and disbursements on this appeal expended—taxed and allowed at ——.

By the court:

A. J. EDGERTON,
Chief Justice Supreme Court, D. T.

All the justices concurring.

175 [Endorsed:] No. 122. In supreme court, Territory of Dakota. October term, 1882. Northern Pacific Railroad Company, plaintiff & respondent, *vs.* Francis Peronto, defendant & appellant. Filed this 14th day of October, 1882. B. S. Williams, clerk.

176 In the Supreme Court of the Territory of Dakota.

FRANCIS PERONTO, Appellant.
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Appellee.

And now comes the said Francis Peronto and prays the court to allow this his appeal from the judgment of this honorable court rendered herein on the fourteenth day of October, A. D. 1882, to the Supreme Court of the United States upon filing a good and sufficient bond.

FRANCIS PERONTO,
By C. W. BUTTZ AND
TWOMEY & FRANCIS,
Attorneys.

Upon consideration of the above petition for allowance of appeal, it is the 31st day of January, 1883, ordered that the said appeal be, and the same is hereby, allowed.

A. J. EDGERTON,
Chief Justice Supreme Court of Dakota.

177 [Endorsed:] Francis Peronto, appellant, *vs.* Northern Pacific R. R. Co., appellee. Appeal. Filed January 31st, 1883. B. S. Will-iams, clerk.

178 In the Supreme Court of the Territory of Dakota.

By the Hon. A. J. Edgerton, chief justice of said court to the Northern Pacific Railroad Company, Greeting:

Whereas, Francis Peronto has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the supreme court of the Territory of Dakota, made in favor of you, the said railroad, and has filed the security required by law. You are therefore hereby cited aud admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of October next, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf: Witness the honorable A. J. Edgerton, chief justice of the supreme court of Dakota Territory, this 31st day of January, in the year of our Lord one thousand eight hundred and eighty-three.

A. J. EDGERTON,
Chief Justice Supreme Court Dakota.

179 [Endorsed:] Francis Peronto, appellant, *v.* Northern Pacific R. R. Co., appellee. Citation. Due service of the within citation hereby acknowledged this 1st day of March, 1883. W. P. Clough and Wm. B. McConnell, att'ys for N. P. R. R. Co. Filed in my office this 22nd day of March, A. D. 1883. B. S. Williams, clerk. C. W. Buttz and Twomey & Francis, att'ys for appellant.

180 Know all men by these presents, that we, Peter Johnson and M. ——, of Fargo, and Francis Peronto, of the same place, of the county of Cass, and Territory of Dakota, are held and firmly bound unto the Northern Pacific Railroad Company in the sum of three hundred dollars, lawful money of the United States, to be paid to the said Northern Pacific Railroad Company, for which payment well and truly to be made, we bind ourselves, our executors, and administrators, jointly and severally, by these presents, sealed with our seal, and dated this 20th day of January, A. D. 1883.

The conditon of the above obligation is such that, whereas Prancis Peronto has appealed from a judgment rendered against him in the supreme court of the Territory of Dakota, wherein the said Francis Peronto is appellant & the said Northern Pacific Railroad Company is appellee, to the Supreme Court of the United States.

Now, therefore, if the said Francis Peronto shall pay all costs, not

exceeding three hundred dollars, which may be awarded against him on the said appeal or dismissal thereof, then the above obligation to be void; otherwise to remain in full force and virtue.

PETER JOHNSON. [SEAL.]
M. WEITTSTEIN. [SEAL.]
FRANCIS PERONTO. [SEAL.]
By C. W. BUTTZ, [SEAL.]
His Attorney.

Signed, sealed, and delivered in the presence of—
C. W. BUTTZ,
D. H. TWOMEY,
Witneses.

181 TERRITORY OF DAKOTA, } ss:
County of Cass, }

Peter Johnson.

The persons named in and who executed the foregoing undertaking, being first duly sworn, doth, each for himself, depose and say: That he is a resident and freeholder of Fargo, of the county of Cass, in said Territory, and worth the amount of three hundred dollars above his debts and liabilities, and exclusive of his property exempt from execution.

PETER JOHNSON.
M. WEITTSTEIN.

Subscribed and sworn to before me, this 20th day of January, A. D. 1883.

OWEN W. SCRIVNER,
Notary Public.

182 [Endorsed:] Bond. Peter Johnson, M. Weittstein, to The Northern Pacific Railroad Company. Filed this 31st day of January, 1883. P. S. Williams, clerk. I hereby approve the within bond and the sureties thereon. Geo. T. Foster, clerk of dist. court Francis, att'ys for N. C. Maigan, deputy. C. W. Butts and Twomey & Cass co., D. T., by Francis Peronto. Approved: A. J. Edgerton, chief justice, D. Ter. Jan. 31st, 1883.

183 *Syllabus.*

The act of Congress of July 2nd, 1864, granting lands to the Northern Pacific Railroad Company in aid of its road was a grant *in presenti*, and vested all the title the United States then had, subject to the conditions subsequent to be performed by the company, there being no condition that the lands should revert to the grantor in case of a failure to perform the conditions by the grantee.

Such title would be ineffectual by a failure to perform such conditions until the United States should inforce a forfeiture.

This act is in the nature of an executory contract. Both parties to it had an interest in its performance; both mutually agreed to perform certain acts. It operated upon land to which the United States had not full title, but to which full title was to be acquired,

and when acquired, such lands were withheld from sale, entry, or pre-emption for the benefit of said railroad, so that no person could get any rights thereto as a settler or a pre-emptor.

The passage of the act of ——, 1864, granting land to this railroad company in words of present grant, and providing that
184 the odd-numbered sections should not be for sale or entry after the survey of the same, held that no person settling and making improvements upon the odd sections could get any rights as a settler or pre-emptor as against the United States or the railroad company, either under section 2281 of the U. S. or the provisions of this act, such lands never having been subject to sale or pre-emption.

Held, further, that the defendant, having settled upon the land in question after the passage of the act, while it was Indian territory, near the line of the road, witnessing the construction of the track, had actual knowledge of the definite line of said road, he cannot now object that notice was not sooner given by the filing of the plat of such definite line in the office of the Commissioner of the General Land Office, nor be regarded as a *bona fide* settler or pre-emptor in any sense.

185 *Appeal from Cass County.*

TERRITORY OF DAKOTA:

Third Judicial District Court.

NORTHERN PACIFIC RAILROAD COMPANY *vs.* FRANCIS PERONTO.

C. H. Butts and Twomey and Francis, attorneys for appellants.
H. P. Clough, attorney for respondent.

HUDSON, J.:

This action was brought by the plaintiff, The Northern Pacific Railroad Company, to recover the possession of a certain piece of land situated within the limits of the city of Fargo, occupied by the defendant.

The title relied upon by the plaintiff to maintain the action is derived from the United States by virtue of a grant of land to aid in the construction of a railroad and telegraph line by plaintiff from Lake Superior to Puget Sound, on the Pacific coast, by the northern route. Act of July 2nd, 1864, vol. 13, U. S. Statutes-at-Large, page 365.

In and by said act, after granting right of way as in section one, section 2 provides as follows: * * * "The United
186 States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act and acquired in the donation to the (road) named in this bill.

"SECT. 3d. And be it further enacted, That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast and to secure the

safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and wherever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office;
187 and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior.

* * * * * * *

"SEC. 6. And be it further enacted, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of this act act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof. and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a
188 price less than two dollars and fifty cents per acre when offered for sale."

It has been repeatedly held that by the terms employed in this act, the title in fee in the land vested in the grantee, subject to the right of occupancy by the Indians. It was also subject to the conditions subsequent- imposed by the act.

It was an absolute grant, but in the nature of a contract by which both parties to it agreed to perform certain acts. If Congress had the power to dispose of the public lands (and this power at this day will hardly be doubted) all the title the United States had was vested in the railroad company, subject to the conditions to be performed on its part.

There is no provision in this act by which the lands were to revert to the grantor in case of a failure to perform these conditions; the title to the land would be uneffected by such failure until Congress should see fit to enforce a forfeiture. The words used are terms of present grant, but at the time this act was passed that portion of the grant lying west of the Red river embracing the land

in this contention was Indian territory in the possession of the Wzapton and Sessiton bands of Indians, hence the act pro-
189 vided that the United States should extinguish as rapidly as consistent with public policy and the welfare of the Indians their title to all the lands falling under the operation of the act.

It was insisted on the argument by the learned counsel for the defendant that these lands, being in the possession of the Indians, were excepted from the grant, because the United States did not have full title within the language of sec. 3 of the act; that it cannot be presumed that Congress granted lands to which others had pre-existing rights. That is very true in case there is nothing to show a sufficient intent; but it is very evident, from the provisions of this act, that Congress did not intend to grant lands to which the Indians had the right of occupancy; otherwise it would not have provided for the extinguishment of their title.

Indeed, if no land was granted by this third section, subject to the Indian title, of which they had possession, the railroad company got but very little by the grant, and its object, as declared in the act, would be most essentially defeated, for the reason that there was at that time no other than Indian land along the line of this
190 proposed road in the Territory of Dakota. The following clause in section three is referred to as limiting the grant and supporting the construction of the defense: "Whenever on the line thereof the United States shall have full title, not reserved," &c., "at the time the line of said road is definitely fixed and a plat thereof filed in the General Land Office;" but it shall be borne in mind that this was an excutory contract; it was as if Congress had said, when we get full title to this land, the general route of the road being fixed, it shall vest absolutely in the railroad company to carry out this agreement; and to get full title it was provided that the Indian title should be extinguished as rapidly as possible, &c.; with this intent, and that other claims should not attach, it was provided that as soon as the general route of the road should be fixed the land should be surveyed and the odd sections should not be liable to sale, pre-emption, &c.; and this in anticipation of the extinguishment of the Indian title. The land was as clearly defined as it could be.

Clearly it was Indian lands, not that Congress intended to ignore the rights of the Indians, but, respecting them, agree to acquire
191 their rights, of course, in an honorable way. Such it seems to us the fair construction to be given to that clause in the act.

This extinguishment was effected by a treaty with the Indians signed and executed on the 2d day of May, 1373. On that day the title became perfect in the Government, and, when the line of said road was definitely fixed by the building of the road and filing the plat thereof in the office of the commissioner, vested in the grantee. The plaintiff having acquired a complete title and right of possession to this land is entitled to recover upon that title unless the defendant can show a prior or better right. This he seeks to do by showing a pre-emption right, which, it is alleged, attached to the land prior

to the title of the plaintiff. He alleges that, having the qualifications of a pre-emptor, he entered upon the land and attempted to comply with the act of September, 1841, section 2259 of which provides that every person (having certain qualifications) "who has made, or hereafter makes, a settlement in person upon the public lands, subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter
192 with the register of the land office for the district in which such land lies by legal subdivisions any number of acres, not exceeding one hundred and sixty or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land."

It seems not [to] be disputed that the defendant had the qualifications of a pre-emptor required by this law; and the record shows that on the 5th day of October, 1871, he settled on the land and improved it, built a small dwelling-house and continued to reside thereon up to the time this suit was commenced; that the plaintiff, at the time of such settlement, was at work on its right of way, laying its track across said piece of land so settled upon by defendant within about ten rods of his dwelling; that on the 28th day of July, 1873, the defendant signed, and on August 11th, following presented, his declaratory statement to the register and receiver of the land office at Pembina, which was the proper office, declaring his intention to claim the said land as a pre-emption, under the said act of Congress, alleging settlement October 5th, 1871. The description of land in said declaratory statement was as follows: The north half of the northwest quarter, and the northwest quarter of the north-
193 east quarter, and lot 1 of section 7, township 139, range 48, subject to sale at the land office at Pembina, in the Territory of Dakota, containing 150.95 acres.

The said line of road traverses this piece of land from east to west.

This statement was presented within three months after the town ship plat was filed in which it was situate. The register and receiver refused to permit the defendant to file said declaratory statement and to pre-empt said land, for the reason, as they stated, that they had been instructed to withhold said land from sale; that the lands therein described were railroad lands. From this refusal of the local land officers the defendant appealed to the Commissioner of the General Land Office, and from the decision of the Commissioner affirming the decision of the local officers to the Secretary of the Interior, who affirmed the decision of the Commissioner. And the defendant has not at any time taken any other or further steps to secure his rights as a pre-emptor, but in his answer in this action alleges that the decision of the Land Department was erroneous, and prays that such decision be reversed.

194 We now come to the principal question involved in this controversy, and upon which it turns, namely: Was this land at any time public land subject to pre-emption, so that the defendant could acquire any rights as a settler or a pre-emptor upon it?

The plaintiff having commenced work on its right of way in 1871,

and continued from that time, and having filed a map of the general route of said line from the Red river to the James river and across this land in Feb'y, 1872, in the office of the Secretary of the Interior, it became the duty of the President of the United States to cause a survey of the land. This authorized the withholding of the same from sale, entry, or pre-emption by the officers of the Department of the Interior, as provided in section six of the act. This provision had that effect without further notice; but it was so formally withheld by notice.

Thus the Government undertook to perform, and did perform strictly, all that the act provided should be done to secure to the defendant that which it contracted for.

This was a mutual contract; the Government had an interest in it, and in its performance on the part of the railroad company.

195

Section three declares that beyond giving aid to the railroad, the purpose was "to secure the safe, and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway. It had an interest, also, in the enhanced value of the public lands, in the vicinity of the road. Therefore, it was perfectly competent for Congress to provide, (to secure this object), that the odd sections falling within operation of the act, be withheld from sale, or pre-emption, that the grant might be effective. They were thus set apart from the public domain, so that no subsequent act, or law of the Government could be construed to embrace them, although not specifically excepted.

All that afterwards remained for the United States to do, with respect to them, and all that could be done under this compact, was to identify the sections by appropriate surveys.

Beecher *vs.* Wetherby, 5th Otto, 524.
Wilson *vs.* Jackson, 13th Peters, 508.

After such appropriation, the Government was not at liberty to sell them, and any other disposition, by sale, or otherwise, would be void. Russell *vs.* Board of Public Schools, 18th How., 19; Chotard *vs.* Pope, 12th Wheaton, 587. After the filing of the map of the general route, and the lands surveyed, the odd sections were not for sale, or pre-emption, and when the Indian title was extinguished by the ratification of the treaty between the United States, and the tribes then occupying them, the provisions of section six, of the act, became effective, and no pre-emption rights could be acquired thereafter.

196

It is not claimed that the defendant could acquire any right before, not even to be regarded as a settler, and there was no interval after the extinguishment, when these lands were subject to sale, so that no right could attach at any time, hence, the status of the defendant, did not bring him within section 2,281, of the R. S., and constitute him a settler, nor within the provisions of the act of July 2nd, 1864.

Should there be any doubt in the minds of any, as to the lands that were actually withheld by the department, reference is had to

the letter of instruction, of the Commissioner of the General Land Office, to the officers. The material part is as follows:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March 30th*, 1872.

197 Register and Receiver, Pembina, Dakota Ter.

GENTLEMEN: I transmit herewith diagram showing the designated route of the Northern Pacific Railroad, under act of July 2nd, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, pre-emption or homestead entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated in this map. * * * This order will take effect from the date of its receipt by you. * * *

(Signed) W. W. CURTIS,
Acting Commissioner.

It is quite immaterial to this action when the plaintiff acquired title to this land, only that it was before this action was brought. There was no strife between the plaintiff and defendant, as contended for by counsel, as to priority of right, because the land was not at any time subject to pre-emption. It is quite true that a person may enter upon public lands not yet subject to entry, and make improvements, and if the land is subsequently declared to be open to sale and pre-emption, if his settlement is followed up by the other
198 steps he may get title; but he takes the risk of its being withheld from sale or appropriate to some other purpose. He acquires no right by his settlement as against the United States. All the right any such settlement would give would be the right to enter the land in preference to another settler coming after; in case the land became open to sale. The question of priority, then, would be of some importance between two such settlers for entry or pre-emption. The rule of first in time first in right would apply. Frisby *vs.* Whitney, 9 Wall., 187; the Yosemite Valley case, 15 Wall., 77; Shepley *et al. vs.* Cowan *et al.*, 1st Otto, 338.

The Government undertook to grant these lands to the railroad company before the defendant or any white man had settled upon them, and it used all the means in its power to make the grant effective, and to prevent any person from acquiring rights in them, except the railroad company. It never consented, by any act of Congress or of the Land Department, to sell them to anybody else, but always refused to do so, and it would be marvelous if the defendont should be able to defeat this attempt in spite of all.

Much stress is laid upon the language of section 6th of the
199 act granting this land, excepting and protecting the rights of settlers, pre-emptors and others; but it is very clear that *bona fide* settlers and pre-emptors are to be thus protected, which this defendant was not and could not be.

The passage of this act was constructive notice to all the world that this land was appropriated to the purpose of this railroad; that

the odd-numbered sections would be withheld from sale and pre-emption as soon as the land was surveyed and the even-numbered sections put in the market at $2.50 per acre, when the general route was fixed; the act so declares, and as a matter of fact this was done long before the Indian title was extinguished, the road was built across the land in question, while the defendant was a mere trespasser; these facts all came to the personal knowledge of the defendant who was on the ground, he presented his delaratory statement to the land office at Pembina with the full knowledge that his improvements were on an odd-numbered section which was not subject to pre-emption, and never had been. In any view we can take of this case we cannot see that the defendant has any valid claim or right to this land.

Judgment of the district court affirmed, all the judges concurring.

[Endorsed:] Territory of Dakota supreme court. The Northern Pacific Railroad Company against Francis Peronto. Opinion. Published and filed this 20th day of November, A. D. 1882. B. S. Williams, clerk.

In Supreme Court. Territory of Dakota.

THE NORTHERN PACIFIC RAILROAD COMPANY, Respondent,
vs.
FRANCIS PERONTO, Appellant.

I, R. S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that the foregoing pages of manuscript and printed matter are and contain in themselves a full, true, and correct of the original transcript on appeal from the district court of Cass county, in and for the third judicial district to this court, upon which said cause was heard and determined in this court, as well as the proceedings in this court, to wit, of the judgment entered and of the opinion of this court filed in this case, and of the undertaking on appeal to the Supreme Court of the United States and the original citations issued out of this court with service thereof duly attached thereto, as the same now appears of record in said cause in this court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 31st day of May, A. D. 1883.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS, *Clerk.*

Endorsed on cover: Dakota Ter'ty Supreme court. No. 253. Charles W. Buttz, executor of Francis Peronto, deceased, appellant, *vs.* The Northern Pacific Railroad Company. Filed 9th August, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

CHARLES W. BUTTZ, *Executor of Francis Peronto, deceased, Appellant,*

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

No. 253.

BRIEF IN BEHALF OF THE APPELLANT.

Statement of the Case.

This cause was instituted in the District Court of Dakota, Third Judicial District, County of Cass, in April, 1881, by the filing by the appellee, the Northern Pacific Railroad Company, of a complaint in the nature of a declaration in ejectment, against Francis Peronto, testator of the appellant, to recover the northeast corner of lot one (1), of the northeast quarter of section seven (7), township one hundred and thirty-nine (139), of range forty-eight (48), situate in Pembina Land District, Dakota. These lands the Railroad Company claims by virtue of the grant to it, by the Act of Congress of July 2, 1864.

Conformably to the practice in that jurisdiction, Peronto, the respondent to this complaint, filed an answer and cross-complaint, in which he denied the company's right to the lands, and set up a right in himself to the N. ½ of N. W. ¼,

and N. W. ¼ of N. E. ¼, and lot one (1) of section 7, township 139, range 48, of which tract the land described in the complaint forms a part, and which tract the appellee claims, and asked relief accordingly. In reply, the company denied Peronto's right as set up, and reiterated its own claim of right and title.

The facts of the case are as follows:

On July 2, 1864, Congress passed an Act, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's Sound, on the Pacific Coast, by the northern route," commonly known as the "Northern Pacific act." (13 Stat., 365.) The first section of the act creates the Northern Pacific Railroad Company, the appellee, defines its powers, &c. The second section grants a right of way for the construction of a railroad and telegraph "through the public lands," with the right to take from the public lands, "adjacent to the line of said road," materials for construction; and concludes with the provision that "the United States shall extinguish, as rapidly as may be consistent with public policy, and the welfare of said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill."

The third section grants to the Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line as said Company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat

thereof filed in the office of the Commissioner of the General Land Office;" with provisions for lieu lands, &c. This section is set out in full in the record, at page 57.

The fourth section provides for commissioners to examine and report upon the road as constructed, in sections of twenty-five miles, upon whose favorable report patents shall issue for "the said lands" adjoining each section so approved, &c. This section also is set out in full in the record, at pages 57–8.

The fifth section provides for the manner of construction, &c.

The sixth section is as follows.

> "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the Act entitled "An Act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

This section also is set out in the record, at page 58.

The remaining sections, from the seventh to the twentieth inclusive, play no part in the cause.

At the date of this act, July 2d, 1864, the lands in controversy were part of a tract then in the occupation of the Sis-

seton and Wahpeton bands of Dakota or Sioux Indians By a treaty with the United States in February, 1867, promulgated in May following, those Indians ceded to the United States certain privileges and rights in the lands occupied by them, except a certain territory, described in Article II. of that treaty, as to which latter territory they ceded the right of way for railroads, wagon roads, &c. Within this excepted territory were included the lands in controversy.

In September, 1872, a further agreement was made between the Indians and Commissioners appointed by the United States, whereby the Indians ceded to the United States all their right, title and interest in and to lands in Dakota, including the lands described in Article II. of the treaty of 1867, and excepting the tracts particularly described and bounded in Articles III. and IV. of that treaty; which last-named tracts and territory were expressly reserved as permanent reservations (known as Devil's Lake Reservation and Lake Traverse Reservation), for occupancy and cultivation. In this agreement provision was made that, as soon as might be, the territory embraced within said reservations should be surveyed, as Government lands are surveyed, "for the purpose of enabling the Indians entitled to acquire permanent rights in the soil;" and further provision was made for patenting the lands to the Indians, &c. This agreement was never ratified by the United States, either in whole or in part, until February 14, 1873, when, by an act of Congress, so much, and so much only, of the agreement as ceded to the United States the rights of the Indians to lands in Dakota, including those named in Section II. of the treaty of 1867, and provided for the permanent reservations, was confirmed; and for the rest the agreement was disapproved. (17 Stats., p. 456.)

In May, 1873, still a further treaty between the Indians and the United States (being, in form, the agreement of

September, 1872, as amended), was made, altogether extinguishing the Indian title to the lands described in Art. II. of the treaty of 1867. This treaty was executed by the Indians at Lake Traverse Reservation May 2d, and by those at Devil's Lake Reservation, May 19th, 1873. (Rec., 17–22.)

Work on the appellee's road, as to the lands in question, was commenced in the fall of 1871, when it was run a short distance and stopped. The road was finally located on September 15th of that year (misstated in the record as 1872.) The line was run west and the location completed on the center stake, near Jamestown. The line was staked when located; the graders began their work in November, and the grading was completed, with the exception of some pile-driving, that fall. Work was resumed in April, 1872; and the road was completed, and trains were running, continuously from the end of the bridge at Fargo through to Jamestown in the fall of 1872, on the line fixed in 1871. The same line of road has been in operation ever since. (Rec., 38–9; Finding II., Rec., 48–9.)

In February, 1872, the appellee filed in the office of the Secretary of the Interior a map showing all that part of the general route of its railroad beginning at the western bank of the Red River of the North (at the eastern boundary of Dakota), and extending westwardly to the James River, in Dakota. All that part of the said general route beginning at the said bank of the Red River of the North, and extending as far westwardly as the west line of the lands in controversy, was identical with the location made in 1871. (Finding III., Rec., 59.)

After the filing of said map, to wit, on March 30th, 1872, the acting Commissioner of the General Land Office forwarded to the register and receiver, at the local land office of the district in which the lands were then situated, a diagram of the said general route so established (denomi-

nated by the acting Commissioner "a diagram showing the *designated* general route"); and by direction of the Secretary of the Interior he instructed the register and receiver "to withhold from sale or location, pre-emption or homestead entry, all the surveyed or unsurveyed odd-numbered sections of *public lands* falling within the limits of forty miles, as designated on this map." This diagram and the accompanying instructions were received at the local office on April 20th, 1872. (Finding IV., Rec., 59–60.)

On May 26th, 1873, the appellee filed in the office of the Secretary of the Interior a map showing, as it denominated it, the definite location of that part of its road passing through the lands in controversy; as to which, all that portion of the said line of so-called definite location was the same location as that made in 1871. A diagram of this so-called definite location was thereupon transmitted by the Acting Commissioner of the General Land Office to the local land office, with appropriate instructions; the Acting Commissioner again speaking of the line of the general route laid down in February, 1872, as "a *designated* line." (Finding V., Rec. 60.)

The appellant's testator, Peronto, being a native-born citizen of the United States and having all the qualifications of a pre-emptor, on October 5th, 1871, entered upon the section of land of which the lands in controversy, are part, and which were then unsurveyed; erected a dwelling-house upon the portion thereof described in the complaint; took up his abode and has ever since resided therein; improved several acres of the land in the vicinity of the house; and had a crop growing, and was cultivating the same in May, 1873, between the 2d and 26th days of that month (Rec. 29, fol. 86). Peronto so entered upon the said land, which, by the survey, was made an odd section, with the

view and purpose of making a pre-emption of the same under the laws of the United States.

On July 28, 1873, Peronto made and signed, and on August 11, 1873, he presented to the register and receiver at the local land office, his declaratory statement touching the lands; which declaratory statement was so presented within three months after the filing of the township plat showing the Government survey of the land (Finding VII, Rec., 61–2).

The register and receiver refused to accept and file this declaratory statement, stating their reasons as follows:

> "That the lands therein described are railroad lands, as shown by the diagram filed in the Department of the Interior, 21st of February, 1872, by the Northern Pacific Railroad Company. The alleged settlement prior to the filing of said diagram and withdrawal of the odd sections are illegal, and cannot be recognized by this office, as the lands, by reason of Indian treaty, were not subject to homestead or pre-emption settlement." (Rec., 11–2.)

From this action Peronto appealed to the Commissioner of the General Land Office, who approved the action of the register and receiver, in the following language:

> "I have to state that I find upon examination that all the tracts [there being other claimants in similar case with Peronto, and their several applications being passed upon at the same time], are within the limits of the grant to the Northern Pacific Railroad Company, which attached to the odd sections May 26, 1873, and at the date of the alleged settlement the lands were embraced in the Sisseton and Wahpeton Indian reservation, the Indian title to which was not extinguished until May, 2d, 1873, at which date the withdrawal for the company became effective, thus excluding any prior pre-emption claims to the odd sections, which could only attach after the extinguishment of the Indian title. I therefore approve your ac-

> tion in rejecting the declaratory statements as to the odd sections, and you will so advise the parties, allowing the usual sixty days for appeal." (Rec., 13.)

In turn, Peronto appealed to the Secretary of the Interior, who reported to the commissioner:

> "I affirm your decision of February 14, 1874, in favor of the company, on the grounds and for the reason stated to have led to the conclusions you reached." (Rec., 14. Finding VII., Rec., 62.)

In responding to the company's complaint in the District Court, Peronto, having first denied the company's right to the lands, set out the above-stated facts as to his settlement and the action of the land officers; alleged that the action of the officers was wrongful, unlawful and under an erroneous construction of law; claimed that but for such unlawful and erroneous action he would have been permitted to pre-empt the lands; and prayed appropriate relief to declare the company's title to the lands described in his cross-complaint null, and to declare title in himself.

In reply, the company averred the rightfulness and lawfulness of the action of the land officers; and in particular reply to an allegation in the answer and cross-complaint that the road was not definitely located until May, 1873, the company says:

> And the plaintiff further alleges that its line of road was *definitely located* and *actually completed and put into operation* from a point at the crossing of the Red river of the North, on or near the eastern boundary of the lands described in the answer, and *extending across the said lands* and thence many miles westward, *prior to January 1st, A. D. 1872;* and that the portion of its said line so located and constructed *has ever since that time been maintained by the plaintiff and operated by it.* . . That prior to March 30th, 1872, the

> Northern Pacific Railroad Company had duly filed in the office of the Secretary of the Interior a map showing the route of its railroad in Dakota Territory east of Missouri river, *including the portion thereof actually completed and put into operation as aforesaid.* . . . And that at the time the said portion of its line of railroad was *located* and *completed* across said lands *as aforesaid, the Indian title thereto had not been extinguished.* (Rec., 7–8.)

By consent of parties, a jury was waived and the trial of the cause was had by the Judge holding the District Court. Judgment was rendered in that court in favor of the company and against Peronto; and on appeal to the Supreme Court of Dakota, the judgment of the District Court was affirmed. Peronto appealed to this court, and he having in the meanwhile died, his executor (to whom he devised all his estate), has been substituted as appellant.

The opinion of the Supreme Court of Dakota is printed in the Record at pages 67–73.

Assignment of Errors.

The court below erred:

1. In affirming the judgment of the District Court of the Third Judicial District of Dakota.

2. In holding that the appellee had acquired from the United States the legal title to the lands described in the declaratory statement of appellant's testator, of which the lands in suit form part.

3. In holding that the appellee was, at the time of beginning this cause, the owner and entitled to the immediate possession of the parcel of ground described in the complaint in this cause.

4. In holding that the appellant's testator was wrongfully in possession of said parcel of ground.

5. In holding that the appellant's testator had no interest in or claim upon the lands described in his answer in this cause.

6. In holding that the construction by the United States Land Officers of the Act of July 2d, 1864, granting lands to the appellee, was lawful and right, as to the lands described in said answer.

7. In holding that the appellee has a lawful right and title, or any right or title to the lands in suit.

8. In not granting the relief prayed by the appellant's testator.

Argument.

I.

LEGAL STATUS OF THE LANDS IN CONTROVERSY AT THE DATE OF THE GRANT.

At the date of the passage of the Act of July 2d, 1864, the lands in controversy were Indian lands. As such, they were not included in the definition "public lands," and so would not, in general, be embraced within or operated upon by the terms of any law disposing of or dealing with "public lands."

> 1. "All that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, be taken and deemed to be the Indian country." (Sec. 1, Act of June 30, 1834, 4 Stat., 729.

In the absence of any different provision by treaty, or by Act of Congress, all the country described by the first section of the Act of June 30th, 1834, as Indian country, re-

mains such as long as the Indians retain their title to the soil.

Leav. L. & G. Co., vs. *U. S.*, 92 U. S., 742.
U. S. vs. *43 Gals. Whiskey*, 93 U. S., 188.
Bates vs. *Clark*, 95 U. S., 204.

2. The Indians are acknowledged to have the unquestionable right to the lands they occupy until extinguished by voluntary cession.

Cherokee Nation vs. *Georgia*, 5 Pet., 1.

The right of the Indians to the lands under the Act of 1834, is as sacred as the title of the United States to the fee.

U. S. vs. *Cook*, 19 Wall., 591.

3. Whenever a track of land has once been legally appropriated, to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and no subsequent law or proclamation or sale will be construed to embrace it, or to operate upon it, although no other reservation were made of it.

Wilcox vs. *Jackson*, 13 Pet., 498, p. 513;
Polk's Lessee vs. *Wendell*, 9 Cr., 87;
University vs. *Indiana*, 14 How., 268.

The above principle "applies with more force to Indian than to military reservations. The latter are the absolute property of the Government; in the former, other rights are vested. Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose." The perpetual right of occupancy of the Indians, with the correlative obligation of the Government to enforce it, negatives the idea that Congress, even in the absence of any positive stipulation to protect

such right, intended to grant their lands to a railroad company, either absolutely or *cum onere*. For all practical purposes, the Indians own their lands. In the free exercise of their choice, they might hold them forever.

Leav. L. & G. Co. vs. *U. S.*, 92 U. S., pp. 742, 747;
U. S. vs. *Payne*, 2 McCrary, 289;
Dubuque, &c., Co. vs. *D. M., &c., Co.*, 109 U. S., 334.

Lands forming part of an Indian reservation at the date of a grant, are excepted from the grant.

Leav. L. & G. Co. vs. *U. S.*, *ubi supra*;
Clarke vs. *Smith*, 13 Pet., 195;
K. P. Co. vs. *Atchison, &c., Co.*, 112 U. S., 422.

Unless, therefore, the act making the grant to the Northern Pacific Company contains "specific language, leaving no room for doubt as to the legislative will," the lands in controversy, being Indian lands as the date of the grant, were excluded from the operation thereof.

But the company contends that the act does contain such "specific language," referring for support of this contention to the closing language of section two. Admitting the validity of this contention in general, we point out, in the consideration of the act which follows, the limited extent to which Congress thereby intended to bring the Indian lands under the operation of the grant, and the extent to which such intent, as manifested by the language of the act, affects the principle of exclusion of Indian lands hereinbefore set forth.

II.

THE NORTHERN PACIFIC ACT.

The sections of the act making the grant to the appellee, material to the present consideration, are the second, third,

fourth, and sixth. Their provisions may be stated as follows:

There is granted to the company every alternate odd section of "public land," to the amount of twenty alternate sections per mile in the Territories and ten alternate sections in the States, on each side of the road, *and whenever* on the line thereof, the United States have *full* title (not *reserved*, sold, granted or *otherwise appropriated*, and free from pre-emption or *other claims or rights*), at the *time* the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, *reserved*, occupied by homestead settlers, or pre-empted *or otherwise disposed of*, other lands shall be selected by said company in lieu thereof, &c.

Whenever the company shall have twenty-five consecutive miles of road ready for service, and the same shall be reported by commissioners, to be appointed by the President for that purpose, to have been properly constructed and completed, patents are to issue for the lands covered by the grant, situated opposite to and co-terminus with such completed section of the road; and so on, as to every twenty-five miles of road completed as aforesaid, except that only ten sections of land per mile shall be conveyed in Minnesota until the whole road shall be finished and in good running order as a first-class railroad.

The President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of the road, after the general route shall be *fixed*, and as fast as may be required by the construction of the road; and the odd sections of land "hereby granted" shall not be *liable* to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in the act.

And the United States shall extinguish, *as rapidly as may be consistent with public policy and the welfare of the Indians*, the Indian titles to all lands falling under the operation of the act and acquired in the donation named therein.

It is upon this last clause, providing for extinguishment of the Indian title that the company and court below ultimately rest the company's claim of right to lands in controversy; upon the ground, as hereinbefore stated, that that clause is in "specific language, leaving no room for doubt as to the legislative will;" which will, it is said, is that the Indian lands should pass to the company under its grant.

In the light of the principle hereinbefore stated, (that, namely, of exclusion of Indian lands, in general, from the operation of railroad grants,) the act under consideration, making a present grant, could not, in the absence of suitable provision, be deemed or held to contemplate the application, *at any time*, of the grant to such lands. But the route indicated in the act must, of necessity, pass through much of the wild Indian lands of the Northwest. Furthermore, the construction of the road would make it expedient to open up that territory, and it was but just that the company itself should, as far as possible and proper, be put in the same position as other companies receiving grants of lands, that is to say: to be given as much of its grant as possible adjacent to its road. From such considerations Congress thought that the usual complete exclusion of Indian lands would operate harshly; wherefore the provision in question was inserted in the act: with the purpose of enabling the company's grant to attach to what at the date of the act were Indian lands, *if in proper condition to pass at the date of definite location*, as prescribed by the act; or, if not in condition so to pass, to furnish the measure of indemnity in other lands for the lands so, as it were, lost. As was said in the *Leav., L. & G. Co.* vs. *U. S.*, in order to negative the

idea of exclusion, "this was necessary, although the road ran through territory occupied by wild tribes." (92 U. S., 744.)

But further than this the provision was not intended to go, and does not go, except that it also holds out a promise on the part of the Government to do what might be deemed expedient to put the Indian lands, at the time of the definite location, in the condition requisite to pass under the grant, viz., in such condition that the United States should have "*full title*" thereto, as defined in the Act.

If now we take this provision for extinguishing the Indian title in connection with the granting clause, viz., section three, we have no difficulty in apprehending the legislative intent. The grant is of odd sections of "*public lands*" along the road, "*and* whenever on the line thereof, the United States shall have *full title*, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or *other claims or rights*, at the time the line of said road is definitely fixed, and a plat thereof filed," &c.

Indubitably, if the grant be *in praesenti*, it does not pass the Indian lands, because at the date of the grant those lands were not "public lands," in the sense in which that term is always used in such acts; and not being passed by the grant, they can never become the subject of ownership by the company under the grant, notwithstanding that, subsequent to the date of the grant, the feature taking them out of the category of "public lands" may, in the meanwhile, have disappeared. And whether the grant be or be not *in praesenti*, the odd sections to which the United States had not full title, and which were not free from other claim or right, at the time the line of the road was definitely fixed, do not pass under the grant; as was said in *K. P. Ry. Co.* vs. *Dunmeyer*, 113 U. S., pp. 640–1:

> "In regard to all such sections, they were *not granted*. The express and unequivocal language of the statute is

that the odd sections *not* in this condition are granted. The grant is limited, by its clear meaning, to the other odd sections, and not to these. No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant. . . Nor is it understood that, in any case, where lands had been otherwise disposed of, their reversion to the Government brought them within the grant."

See *Leav., L. & G. Co.* vs. *U. S., ubi supra;*
Newhall vs. *Sanger*, 92 U. S., 761;
Wolcott vs. *DesMoines Co.*, 5 Wall., 681;
Ex parte Flint and M. R. R. Co., Copp's L. L., 385;
Cent. Pac. Co. vs. *Nevada*, " 424,
Phelps vs. *N. P. R. R. Co.*, 1 Law Dec. (Dept. Int), 384.

So that the continuance of the Indian occupancy and title of the lands in controversy to the time when the line of the road should be definitely fixed, would constitute a reservation or appropriation of the lands, which would prevent their passing under the grant. Accordingly, Congress undertook, in aid of the company, to provide against such continuance. But it had in view other considerations than the aid of the company: it owed to the Indian tribes and, indeed, to the dignity and honor of the Nation, the obligation to respect the rights and equities of the Indians in the premises. Wherefore, with due regard to all considerations, this provision was inserted in the act:

"The United States shall extinguish, *as rapidly as may be consistent with public policy and the welfare of the Indians*, the Indian titles to all lands falling under the operation of this Act, and acquired in the donation to the road named in this bill."

This was as far as Congress thought it proper to go; and its meaning in the premises is clear.

The company was to have the odd sections to which the United States had "*full* title," and free from other claim or right, at the time of definite location and the filing of the plat thereof; there was an outstanding "*Indian title*" at the date of the grant, which the Government alone could remove; this the Government would remove, as far as it deemed proper; as far as, *in its judgment*, public policy and the welfare of the Indians would permit. But suppose that, in the judgment of the Government, "public policy and the welfare of the Indians" permitted extinction of the Indian title at one point, and not at another, at a time antedating the definite location of the road: is there any room for doubt as to the situation of the company? At the former point, the odd sections along the road passed under the grant; at the latter point, they did not pass: the *rapidity* of extinction permissible, in the judgment of the Government, did not keep up to that of the company in constructing its road. In other words, it is perfectly clear that the Government undertook no more than to move in the extinction of the Indian title at the pace which its judgment, public policy and its sense of obligation to the Indians approved; while the company had to be content with receiving only such lands in place as had, at that pace, been freed from the Indian title at the time designated. This answers the company's contention that the grant and the provision as to extinguishing the Indian title, when taken together, not only imposed on the Government an obligation to extinguish that title in sole consideration of the company's benefit, but also in effect operated a transfer to the company of the Government's title, subject only to the Indian right of occupancy: whereby, on the extinction of the Indian title *at any time*, the full title passed to the company. This contention wholly overlooks the all-impor-

tant fact that the United States were *first* to have full title before the company was to take at all.

And one other consideration is conclusive of the question. Manifestly, the right of the company to indemnity lands depends upon the loss that would befall it by reason of given odd sections being not in the prescribed condition to pass under the grant; this "being not in the prescribed condition to pass" must occur at a time certain, otherwise the taking of the indemnity lands would be most uncertain, and the provision in that behalf practically nugatory; wherefore, "the time the line of the road is definitely fixed" is, by the act, made the time to which all claims for indemnity lands are to be referred. If now the company's contention be correct, it might well be that at "the time the line of the road is definitely fixed" there would be numerous odd-sections in practically permanent reservation for the Indians; in which case the company could not take either those lands or *any equivalent therefor*. So evidently was this not the contemplation of Congress, that argument to that effect is wholly superfluous. We may be content with imagining the vigorous and necessarily successful contention in this behalf that would be made by the company, should the land officers refuse it permission to select indemnity lands for "odd sections" thus within a so-called permanent Indian reservation on the line of its road at the time of definite location.

These views are strongly re-inforced by the consideration of a further important element in the case, to which we now pass.

III.

DEALINGS OF THE GOVERNMENT WITH THE SISSETON AND WAHPETON INDIANS.

That Congress was not unmindful of its undertaking in aid of the company to extinguish the Indian title, and had at the same time due regard for public policy and the welfare of the Indians in carrying out that undertaking, in connection with the lands in question, we find ample witness in the treaty of May 2d, 1867, with the Indians then in occupancy thereof (15 Stats., 506.)

Those Indians, at a time of outbreak by their brethren, involving the capture and massacre of settlers, had remained faithful to their obligations to the Government; had "freely perilled their lives during the outbreak to rescue the residents on the Sioux reservation, and to obtain possession of white women and children made captives by the hostile bands;" and were "at all times prompt in rendering service when called upon to repel hostile raids and to punish depredations committed by hostile Indians upon the persons and property of the whites." To take their lands from them in defiance of this loyalty, and in disregard of these humane services, would have been more than base.

Accordingly, full recognition was made of these facts in the provisions of the treaty. And such account of the welfare of the Indians did the Government take in the premises, that all persons, not members of the bands (except in the employ of the Government, or located under its authority), were forbidden to locate upon their lands for any purpose. Furthermore, by formal cession, the Government procured from the Indians the very right of way necessary for the construction of the company's road, *but nothing more*; thus certifying its own construction of its promise to the company, and at the same time attesting its recognition

of the higher obligation to public policy and the welfare of the Indians.

This action of the Government is further significant as showing its recognition, three years after the date of the company's grant, of the Indian rights and title to the lands in controversy. In effect, this action was a new reservation of those lands, and wholly removes all room for contention that the Government's fee in the lands was ever granted to the company. Account was specifically taken by Congress of action of this sort, operating new reservations, in the joint resolution of May 31st, 1870 (16 Stats., 378), wherein provision is made for the selection by the company of other lands in lieu, and "to the amount of the lands that have been granted, sold, *reserved*, occupied by homestead settlers, pre-empted, or otherwise disposed of *subsequent to the passage of the act of July 2, 1864.*"

Later yet, by act of June 2d, 1872 (17 Stats., 281), Congress directed the Secretary of the Interior to examine and report upon the title and interest of the Indians in the premises; and upon his report, the agreement of September, 1872 was negotiated. Still later, in May, 1873, a new treaty was made with those Indians, extinguishing their title by a money payment of $800,000. In all this, we see the fullest recognition of their rights, and, save in respect to the right of way, no reference, direct or indirect, to any railroad company. How, in the face of this, can it be seriously contended that Congress in the act of *1864*, granted the lands of these Indians to the appellee, subject only to the right of occupancy?

It being thus demonstrated that the act of 1864 did not grant to the company any Indian lands to which the Indian title should not have been extinguished at the time the line of the road might be definitely fixed; and that the undertaking to extinguish the Indian title was intended only to put as much of the Indian lands as the United States should

think proper in condition to pass under the grant; we proceed now to a consideration of the question whether, at the time the line of the road was definitely fixed, the lands in controversy had in fact been put into condition so to pass: in other words, to a consideration of the status of the lands at that time.

IV.

STATUS OF THE LANDS AT THE TIME THE LINE OF THE ROAD WAS DEFINITELY FIXED.

The determination of this question depends primarily upon the ascertainment of the time the line was "definitely fixed," within the meaning of the act. And as to this feature the case presents two aspects, each of which we treat in turn: 1. The contention of the company that the definite fixing of the line was established by the filing of its map in February, 1872, and 2, The contention of Peronto in the Court below, that this definite fixing was not established until the filing of the map of May, 1873.

Before dealing with these contentions, (which we shall do in order of the time indicated by them), we inquire at the outset:

What constitutes definite fixing of the line, within the meaning of the Act. We are not without a clear guide to the solution of this question.

The language of the Act (Sec. 3) is:

> "There be, and hereby is, granted · · · at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

And this Court has spoken with precision on the subject:

> "The route must be considered as 'definitely fixed' when it has *ceased to be the subject of change at the voli-*

tion of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is *adopted* by the company, and a map *designating* it is filed with the Secretary of the Interior and accepted by that officer, the *route is established;* it is, in the language of the Act, 'definitely fixed,' *and cannot be the subject of future change,* so as to affect the grant, except upon legislative consent. No further action is required of the company to *establish the route.* · · · A map *designating* the route of the proposed road, made by the engineers of the company after careful surveys, and adopted by its directors, was filed on the 25th of March, 1870, with the Secretary of the Interior, who accepted it, and on the 26th of that month transmitted it to the Commissioner of the General Land Office, with directions to instruct the proper local officers to withhold from sale, or other disposition, the odd-numbered sections within the limits of twenty miles on each side of the route. · · On the 13th [of April following] the defendant entered · the land in question. · · His entry, as thus seen, was after the map had been filed and the route 'definitely fixed,' and *the grant had attached to the adjoining odd sections.*"

Van Wyck vs. *Knevals*, 106 U. S., pp. 366-8.

"The act which fixes the time of definite location is the act of filing the map or plat of this line in the office of the Commissioner of the General Land Office. The necessity of having certainty in the act fixing this time is obvious. Up to that time the right of the company to no definite section, or part of section, is fixed. Until then many rights to the land along which the road finally runs may attach, which will be paramount to that of the company building the road. After this no such rights can attach, because the right of the company becomes by that act vested. It is important, therefore, that this act fixing these rights shall be one which is open to inspection. At the same time it is an act to be done by the company. The company makes its own preliminary and final surveys by its own

officers. It selects for itself the precise line on which the road is to be built, *and it is by law bound to report its action by filing its map* with the Commissioner, or rather, in his office. *The line is then fixed. The company cannot alter it so as to affect the rights of any other party.*"

Kan. Pac. Co. vs. *Dunmeyer*, 113 U. S., p. 634.

And in the latest case in this Court involving the question, the Court, citing *Van Wyck* vs. *Knevals*, *supra*, said:

"The main question here, as in the case mentioned, is, when was the route of the road to be considered as 'definitely fixed,' so that the grant attached to the adjoining sections. In the case mentioned we held that the route must be considered as 'definitely fixed' when it had *ceased to be the subject of change at the volition of the company;* · · that when the route was *adopted* by the company, and a map designating it was filed with the Secretary of the Interior, and accepted by that officer, the route was *established.* · · Since the decision of that case, the Court, in *Railway Co.* vs. *Dunmeyer*, 113 U. S., 629, has reconsidered the question and come to the same conclusion, the receipt of the map in the Land Office without objection being considered as equivalent to its acceptance.

"It appears from the agreed statement of facts that previous to the 21st of March, 1870, the engineers of the railway company surveyed and *staked out upon the ground* the proposed line of the road, made *a topographical map of the country through which the line ran*, showing the Government surveys and the proposed route with reference to the section lines, and the towns, counties and rivers; that *such map* was on that day approved by the board of directors, and on the 25th day of the same month was filed, together with a certificate of the approval endorsed thereon, with the Secretary of the Interior, who approved the same, and on the 28th of the same month transmitted it to the Commissioner of the Geneneral Land Office, with directions to instruct the proper local land officers to *withdraw* from sale or other disposal all the odd-numbered sec-

> tions falling within the limits of twenty miles on each side of the line of the route. · · It thus appears that · the map of the company *designating* its route had been filed with the Secretary of the Interior March 25th, 1870, *and the route had thereby become definitely established.* The title of the company to the adjoining odd sections was then *fixed.*"
>
> *Walden* vs. *Knevals*, 114 U. S., pp. 374–6.

In this case it is to be observed that, as in the case at bar, the act (14 Stats., p. 211, Sec. 4), provides for but one thing calling for a withdrawal, to wit: the filing of a map *designating* the route; and the court holds that such map, following the actual marking out of the line upon the ground, although described as *designating* the route, in fact and in law *definitely fixed* it.

The conclusion to be derived from these adjudications may be thus stated:

It is the *act*, and not its *denomination*, that definitely fixes the line of the road; and the criterion is: has the act done *terminated the volition of the company* in respect of changing that line? If so, the line is "definitely fixed." And, further, just as in *Van Wyck* vs. *Knevals*, the court declares (p. 367), that after the company shall have done what is incumbent on it, no neglect of duty by the land officers can impair its rights, however prejudicial such neglect might prove to others; so, as said in *Dunmeyer's* case (p. 634), the company having selected "FOR ITSELF *the precise line on which the road is to be built*," and being '*by law bound to report its action by filing its map*," no delay or neglect on its part so to do, whether accidental or wilful, can by it be perverted to its own advantage; for no corporation, as no man, can profit by its own wrong.

Tested by these principles, when was the appellee's line "definitely fixed?"

1. The appellee contends, both in its response to the answer and cross-complaint and in its testimony, that the line was "definitely located" prior to January 1st, 1872, and its map of such location filed prior to March 30th, of that year. The exact date of filing, as shown by the copy put in evidence, was February 21st, 1872. (Rec. 38, fol. 106, Finding III., p. 48.)

The statement of the company's contention in its replication has already been noticed: that its "line of railroad was *definitely located and actually completed and put into operation*" across the lands in controversy, "and thence many miles westward, prior to January 1st, 1872;" "that the portion of its said line *so located and constructed* has ever since that time been *maintained and operated by it*;" "that prior to March 30th, 1872, [it] duly filed in the office of the Secretary of the Interior a map showing the route of its railroad in Dakota Territory east of Missouri river, including the portion thereof *actually completed and put into operation as aforesaid;*" and that on such filing the usual withdrawal was directed by the General Land Office.

This contention is fully sustained as to its recital of facts, by the testimony and findings. (Findings II.–IV., Rec. 48–9.)

Do these facts constitute a definite fixing of the line of the road at date of February 21st, 1872? *We agree with the appellee in answering this question in the affirmative.*

As concerns the portion of its road running through the lands in controversy, the company entered and commenced work in the fall of 1871; during the same fall, it "caused all the said part of its said line of railroad, as the same had been *located as aforesaid*, to be graded and prepared for the superstructure thereof;" in June, 1872, the superstructure was put "*upon the said grading*," the rails were laid, and all that part of the road *fully completed and running;* "and ever since that time said railroad has been maintained and operated over and across the said section, *as the same was*

fixed and located in the year 1871." In February, 1872, the company filed a map showing all that part of its general route west from the Red River of the North to the James River, all that part of the said general route passing through the lands in controversy being "*identical with the said location thereof made in the year 1871.*" (Findings II. and III., Rec., 48–9; Test'y of Hobart, Sup't of Co.'s Dakota Division, Rec., 38–9.)

So far as concerns the section under consideration, a more definite fixing of the line of the road, in point of fact (involving, as it does, actual construction and the filing a map showing the line of such construction), is not conceivable. And that such fixing in fact is a fixing in law, is incontrovertibly established by the holdings of this Court, above cited.

But if confirmation of this view be needed, it is at hand in the provisions of the Act itself, and the action of the company thereunder.

a. By Section 4 of the Act, on the completion of given sections of the road and approval thereof, the company may demand patents *confirming*, not conveying, its right and title to the lands passing under the grant. As was held by this Court in *Whitney* vs. *Morrow*, 112 U. S., 693, while a direct legislative grant of public lands is the highest muniment of title, and is not strengthened by a subsequent patent of the same land, yet that instrument may be of great service as proof of title, and as an instrument of quiet and security to the holder.

But a patent of *confirmation* supposes a *prior* title. We are not unaware of the decision of this Court in *N. P. Co.* v. *Traill County*, 115 U. S., 600; but that decision does not affect the argument. The Court there held that, for purposes of local taxation, the legal title to the lands granted did not pass to the company until conveyance made after

payment of the costs of survey, &c., as required by the act of 1870. But this does not change the fact that upon construction all that could be had been done to cause the grant to attach; and on payment by the company of the prescribed costs and consequent receipt of the patents, its title would relate back to the act causing attachment of the grant.

Stark vs. *Starrs*, 6 Wall., 418.

And the immediate delivery of the patents depended solely upon an act in the exclusive volition of the company, to wit: making the necessary payment.

So that, as seems beyond controversy, the act in effect declares that, at any rate, the company's right and title become perfect by the *construction* of its line; and it surely needs no argument to enforce the position that the company having thus done the thing which entitles it to patents, to wit: construction, no possible room for doubt is left as to the definite fixing of the line, which of necessity must have preceded that construction. Could the company thus having constructed its road, and so being in a position to demand patents, make any change in the line which the construction had followed? Did not its volition in respect of changing the line thereupon disappear? thus responding to the touchstone of definite fixation.

b. The act makes no real discrimination between fixing the general route and the definite fixing. It will be noted that while in other acts making grants to railroad companies the general route is spoken of as being to be "designated," in this act it is spoken of in section 6, as being to be "fixed."

This is not an accidental difference. The act provides for survey "for forty miles in width on both sides of the entire line of said road, after the general route shall be *fixed*, and as fast as may be *required* by the *construction* of said road."

This is the only place in the act in which any fixation, designation or indication of the general route is mentioned. The subject in connection with which the general route is named makes clear the significance of the word "fixed," in place of the usual word "designated." The Government was to undertake the costly work of surveying the lands along the road, to indicate those to which the company might be entitled. If such survey were to be along the "designated" route, it might not be more than begun before it might prove wholly of no avail by a subsequent change of line; and so on, according to fresh discoveries by the company's engineers of increased facilities and availability of still different routes. Wherefore, the act uses the word "fixed" *ex industria*, to avoid the possibility of such a consequence. And reinforcement of this view is to be found in the later action of Congress, in the act of July 15, 1870 (16 Stat., 305), throwing the cost of survey, selection, and conveyance of its lands upon the company, and making payment of this cost into the Treasury of the United States a condition precedent to conveyance. (See *N. P. Co.* vs. *Traill County*, 115 U. S., 600.)

This construction of the act is made still more certain by the words immediately following the language just quoted: "and the odd sections of land *hereby granted* [that is, as having now been ascertained by the fixing of the line or route], shall not be liable to sale, or entry or pre-emption *before or after* they are surveyed," &c. The contemplation of the provision is clear:

When the route is fixed, the grant attaches; there shall then be a survey; but inasmuch as a survey takes time, the lands along the fixed route which, on the survey, shall appear to be odd-sections, shall, so far as sale, entry, or pre-emption is concerned, be saved to the company from the date of fixing the route. Manifestly the construction was to be along a fixed line or route; and why should the re-

quisites of construction control the rate of survey, if the line of construction was to be in any wise different from the *fixed* general route which the survey was to follow?

There is another consideration going to show that the use of the word "fixed," instead of the word "designated," in the act was intentional. In other acts, as, for example, the Pacific Act of July 2, 1862, there is no provision for indemnity lands, although the grant there was only of *five* sections to the mile on each side of the road. In that case, it was thought but right to require a withdrawal of all lands possible to fall under the grant, as soon as the general route should be "designated, as near as may be." Not to have done this would have been to hold out an invitation to all attracted by the mere experimental location of the route to settle upon and enter the lands in the vicinity, to the great prejudice of the company, which, having no indemnity lands on which to fall back, might so be totally deprived of a large portion of its grant.

But in the case of the Northern Pacific Company, the grant was not only of ten and twenty sections to the mile in the States and Territories respectively, but also indemnity lands were provided for within a limit of ten miles additional to the limit for lands in place. In the language of this Court, this was truly a "magnificent grant," the lands covered being "equal in quantity to forty or fifty thousand square miles, an area as large as an average State of the Union." In such case, there could be no danger that the company would not obtain the full quantity of lands granted; and so there was no necessity for a mere "designation" of the route, to be followed by a withdrawal, before the line should be "fixed." This is in conformity to the principle underlying withdrawals, as repeatedly expounded by this Court.

> "Formerly, lands which would probably be affected by a grant were, as soon as it was made, if not in ad-

vance of it, withdrawn from market. But experience proved that this practice retarded the settlement of the country, and at the date of this act [1863], the rule was not to withdraw them until the road should be *actually located.* In this way, the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were definitely fixed; and if it then appeared that a part of the lands within those limits had been either sold at private entry, taken up by pre-emptors, or reserved by the United States, an equivalent was provided."

Leav., L. & G. Co. U. S., 92 U. S., p. 748.

"The limitations upon the grant are similar to those in numerous other grants of land made by Congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficuties of ascertaining the most favorable route. It was not for the interest of the country that in the meantime any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was surveyed, fall within the limits of a grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and pre-emption, and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were *ascertained*, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, *other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired.*"

Railroad Co vs. *Baldwin*, 103 U. S., p. 429.

"In many instances, where the sections would fall along such route, sales of land had already been made

by the United States, and pre-emption rights of settlers had attached; and before the route would be definitely fixed by surveys and maps, many other sales of land falling within the sections would probably be made and other pre-emption rights attach. It was not for the interest of the country that any portion of the public lands should be withheld from sale and settlement because, when the route of the roads was definitely determined, they might fall within the limits of the grants; nor was it the purpose of Congress to lessen the extent of its aid because it might ultimately be found that, at the time of its grant, or when the route was determined, portions of the land designated had already been disposed of or preemption rights had attached to them. The policy of the Government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time, to advance such settlement by liberal donations to aid in the construction of railways. The acts of Congress, in effect, said: 'We give to the State certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of or such rights may not have attached *when the routes are finally determined.* If at that time it be found that of the lands designated any have been disposed of, or rights of settlers have attached to them, *other equivalent lands may be selected in their place* within certain prescribed limits.' The encouragement to settlement by aid for the construction of railways was not intended to interfere with the policy of encouraging such settlement by sales of the land or the grant of pre-emption rights."

Winona, &c. Co. vs. *Barney*, 113 U. S., pp. 625–6.

The teaching of these cases is simple and direct: Formerly, to guard against possible impairment of a grant to aid a railroad company, lands that might fall within the limits of the grant when ascertained, were withdrawn from settlement and sale; the result of this having been discov-

ered to be an interference with the settlement of the country, a remedy was sought that would at the same time preserve the grant and advance that settlement; and this remedy was found in the principle of granting indemnity lands.

Still a further indication that the fixing of the general route prescribed by the sixth section of the act under consideration means the definite location of the road, and not a mere designation of the route, is afforded by a comparison with the Pacific Act of 1862, and other acts providing for the withdrawal of lands upon the filing of a map designating the general route. In the act in question, after the general route shall be fixed, it is made the duty of the President of the United States to cause the lands to be surveyed as fast as may be required for the construction of the road; and as fast any twenty-five consecutive miles shall have been constructed and approved by commissioners to be appointed patents are to be issued. The Pacific Act of 1862 contains similar provisions for surveying lands, appointing commissioners and issuing patents; and this was to be done, when? Not when the map designating the general route was filed, but only when "any portion of said route shall be *finally located.*" Why the survey should not be made or patents issued before definite fixation or location, we have discussed above: it is sufficient here to point out that in the two acts compared certain things were to be done, and they were to be done after what one act calls "final location," and the other a "fixing" of the general route. Evidently Congress considered each of the two expressions a definition of the same act.

c. And the action of the company itself is strong corroboration that the line of 1872, was the line of real definite fixation, no matter by what name the company, or even the land officers, may have seen fit to call it.

Passing the already noted contention of the company to this effect in its replication and testimony, we note the further fact that the company, in February, 1872, filed in the General-Land Office a map of its route. The act requires of the company the filing of but one map, that, namely, of definite location; the object of this requirement being the ascertainment geographically of the lands to pass under the grant, if in the prescribed condition to do so. Knowing its duty in the premises, and the conditions on which it was to procure the lands immediately adjacent to its road, the company wisely fixed its road definitely at the earliest practicable date; for the act makes no provision for withdrawal of the lands at any time before fixation of the route. So the line was fixed and a map filed, and nothing was left the company to do to establish the line. Consistently enough, the company, in its very pleadings in this cause, insists upon this position.

If, then, as seems beyond doubt, the time the line of the road was "definitely fixed" was February 21st, 1872, how does that fact affect the case in hand? In the court below the company contended, and persuaded the court, that by the act making the grant the fee of the Indian lands passed to the company, and that extinguishment of the Indian title at any time after the route was fixed enured to the benefit of the company, and so perfected its title.

The error of this position has already been pointed out, and is manifest: it disregards the cardinal fact that no lands passed to the company under the grant except "*public lands*" to which the United States had "*full title* . not *reserved* . or *otherwise appropriated*, and free from . *claims* or *rights*, at the time the line of the road is definitely fixed." Says the company in its replication: "At the time the said portion of its line of railroad was *located* and *completed* across said lands *as aforesaid*, the Indian title thereto

had not been extinguished." This is true, for that title was not extinguished until May, 2d, 1873.

What then? Simply this: The Indian title still outstanding in February, 1872, the lands were not "public lands" in the sense in which that term is used in the act. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under *general* laws." *Newhall* vs. *Sanger*, 92 U. S., 761. And, further, so long as the Indian title remained, the United States did not and could not have the "*full* title" described in the act. As was said in *Dunmeyer's* case (p. 640), already cited, such lands "were *not granted.*" A volume of argument could not make this plainer.

2. Turning now to the other contention, that the line of the road was not definitely fixed until May, 1873, how stands the case if that contention be correct?

Under the act, no lands pass to the company which were not, at the time of definite fixation of the line, "free from pre-emption, or other claims or rights."

Peronto settled in 1871. The Indian title was extinguished May 2d, 1873. In contemplation of law, for purposes of his claim, Peronto's settlement is deemed to have been made *eo instanti* with the extinguishment of the Indian title. On the hypothesis with which we are dealing, the line of the road was not fixed until twenty-four days later, on the 26th of May, 1873. The township plat was filed in the local Land Office July 25th, 1873. (Rec. 38, fol, 105.) Peronto made his declaratory statement three days later, and presented the same on August 11th following, or within less than three weeks after the filing of the township plat, the law allowing him three months.

Unless, therefore, there is something in the case to the contrary, Peronto thereby became entitled to pre-empt the

lands sought to be entered by him, subject to the company's right of way.

Railroad Co. vs. *Baldwin*, 103 U. S., 426.

Two contentions, to the effect that there is in the case something to the contrary, are conceivable: *a.* That by the withdrawal by the land officers, the lands in question were withheld from pre-emption, and *b.* That the act itself prohibited pre-emption of the lands. Each of these contentions rests ultimately on the sixth section of the act.

a. It may be claimed that on the filing of the map of February 21st, 1872, the Commissioner instructed the local officers to withhold the lands from pre-emption.

But to this it may be replied, first, that such withholding was not directed by the act; and, secondly, that there was, in fact, no such instruction to withhold.

(1.) The act directs no withholding by the land officers. Its provisions will be searched in vain for such direction to those officers; the question whether the sixth section is, in itself, a legislative withdrawal, as it is said, of the lands, is considered under the next head, below.

(2.) And the withdrawal directed by the Commissioner did not affect the lands, in the condition in which they were at the date of such instruction, March 30th, 1872. They were, at that date, still Indian lands; and the direction was to withhold "*public* lands." As already pointed out, this expression does not embrace Indian lands; and so had no application to the lands in question. Moreover, as to all lands to which, if in condition to pass at the time of definite fixation of the route, the grant would attach, but which, at that time, should not be in such condition (and the lands in controversy fall in that category), the act, in terms, extends the provisions of the homestead and pre-emption laws: "but the provisions of [those laws] are hereby extended to all

other lands on the line of said road when surveyed, excepting those *hereby granted* to said company." The language is, not "to the even-numbered sections" but, "to *all other* lands not *hereby granted*." As not only the even-numbered sections, but also lands reserved or otherwise appropriated, are "not granted," to all such the pre-emption laws are extended. Any withdrawal of such by the land officers is, then, not only not permitted by the act, but also in direct defiance of its provisions.

b. The other contention, that the act itself prohibited pre-emption of the lands; in other words, that the sixth section of the act was in itself a legislative withdrawal in advance of definite fixation, rests on no better ground.

(1.) If that section was such legislative withdrawal, the case is in no different condition than if the withdrawal had been executive. No withdrawal can operate on lands not "subject to sale or other disposal under general laws." If a legislative withdrawal, it was such either at the date of the act or at that of the filing of the map of February, 1872. In either case it could not affect the lands in question, for at both dates they were still Indian lands.

(2.) But there is in the act no legislative withdrawal in advance of definite fixation of the route; nor does the act forbid pre-emption of the lands in question.

We have considered above (*ante*, p. 29), the principle of withdrawal in advance of definite location, and as the result of such consideration have maintained that no withdrawal in advance was contemplated or necessary in the premises. We refer the court to what is there said as having equally direct application to the question under immediate consideration as to the subject in connection with which it is there advanced.

The language relied on in support of the claimed with-

drawal in advance of definite fixation of the line of the road, is that of section 6, already quoted:

> "The President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; *and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act:* but the provisions of the [pre-emption act and amendments and the homestead act] shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, *excepting those hereby granted to said company.* And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

As above pointed out, the fixation of the general route here spoken of is the same thing as the definite fixation of the line of the road referred to in section 3; and the provision prohibiting pre-emption was inserted for the purpose of preventing the loss to the company by subsequent pre-emption, in the interim before survey, of lands which, had they been already surveyed, would, at the date of fixing the route have been mathematically ascertained as within the grant. In other words: it was contemplated that the fixation of the route would precede the survey; and it was foreseen that settlers or entrymen locating on the land after such fixation and before survey, might assert claims against the company to the lands occupied by them; and to remove all doubt on this point the provision was inserted. Beyond this it has no force, and, by its very nature, it could have none; for a prohibition against sale, entry or pre-emption, can have no meaning except as referring to lands liable to one of those three particular forms of dis-

position. And in fact, as already stated (*ante* p. 35–6), to all other lands than those granted, the pre-emption laws are specifically and in terms extended.

That this was clearly understood by Congress appears on a comparison of the language of this section with that of the grant in Section 3. The description of granted lands in Section 3 is: "not *reserved*, sold, *granted*, or *otherwise appropriated*, and free from pre-emption or *other claims* or *rights*, at the time the line of said road is definitely fixed." Now, as to lands *reserved*, *granted*, *otherwise appropriated*, or subject to "other *claims* or *rights*," at the time the route was fixed, there could be no fear that the company might be put in worse condition than it was; for such lands it had irrecoverably lost. But as to lands liable to the other forms of exception from the grant, viz., sale, entry, or pre-emption, there was undoubted opportunity for at least *claim* as against the company in respect of the lands liable thereto. The Act grants certain "odd sections"; and as, in the absence of a survey, it might with some plausibility be contended that there were no "sections," odd or even, this provision was inserted to remove all room for *claims* resting on such contention.

To give the language prohibiting pre-emption before or after survey any other construction, would be in effect to hold that such pre-emption was prohibited from the date of the Act. This never was intended; for such construction makes wholly idle the provision, in the third section, for freedom from pre-emption claims at the time of definite location. If such had been the intention, this freedom would have been prescribed at the date of passage of the Act. And any such construction is directly negatived by the subsequent action of Congress, in the joint resolution of May 31st, 1870 (16 Stats., 378), already cited. That resolution in terms provides for making up to the company "the amount of the lands that have been granted, sold, reserved,

occupied by homestead settlers, *pre-empted*, or otherwise disposed of *subsequent to* the passage of the Act of July 2, 1864."

Moreover, the contention of the company in this behalf puts it in the attitude of claiming, for one purpose, that the location of 1872, was a *fixation*, and, for another purpose, that it was merely a *designation* of the route.

The sixth section, containing the language claimed to constitute a legislative withdrawal, first provides that the general route shall be fixed, and then sets forth the language claimed to operate the withdrawal. Very clearly, then, to contend for a withdrawal, the company must concede the route first to have been fixed. But inasmuch as this would seem to involve such a fixing as to destroy the volition of the company in respect of future change, it is also contended, to avoid this conclusion, that the act thus claimed to operate a withdrawal, was, in fact, only a designation. In other words: for the purpose of asserting a legislative withdrawal, it is contended that the route of 1872 was fixed; while for the purpose of preserving the volition of the company to make a future change, and so to bring into operation of the grant lands that may in the meanwhile have been put into condition to be reached thereby, it is contended that the line then reported was merely a *designation* of the route.

But it is not to be permitted that the company may, at one and the same time, claim the benefits, and repudiate the disadvantage of either contention taken singly. In seeming recognition of which fact, the company is perforce driven to assume the attitude taken in the Court below, to wit: that the filing of the map of 1872, *was* a definite fixation, but Peronto's claim is excluded because the act grants the fee of the Indian lands, subject only to the Indian right of occupancy.

This attitude we have already considered. (Ante p. 14–20.)

For an able and thorough consideration of the question of Peronto's rights on the hypothesis just treated, to wit: that the line of the road was not definitely located until May 26th, 1873, we refer the Court to the recent decision of the Commissioner of the General Land Office, in the case of *Vaughan* vs. *N. P. R. R. Co.*, reported in Copp's Land Owner, Vol. 12, p. 303 (issue of March 1st, 1886), and printed as an appendix hereto. (*post*, p. 43)

V.

PERONTO'S RIGHT TO THE LANDS.

If the lands were the subject of pre-emption, the record leaves no doubt of Peronto's right to enter the lands.

The seventh finding, which is fully sustained by the evidence, shows: First, that he was a qualified pre-emptor under the laws of the United States; Second, that he settled upon the lands in question for the purpose of pre-empting them, and subsequently complied with the requirements of the law, as to residence, cultivation, &c.; Third, that he made the necessary declaratory statement and tendered the same to the proper local officers within the period prescribed by law; and, Fourth, that on the refusal of those officers to accept his statement for filing, he exhausted his remedies by successive appeals to the Commissioner of the General Land Office, and the Secretary of the Interior.

Although at the date of his settlement, the lands being Indian lands, he then acquired no rights; yet when the Indian title became extinguished, he was entitled in his declaratory statement to allege location and improvement prior to such extinguishment, and to enter the lands accordingly.

1 Lester, Land Laws, 125, 423.

For upon the extinguishment of the Indian title, the lands became open to pre-emption.

Rev., Stats., sec., 2257.

And his right to enter the lands could not be prejudiced by the refusal of the local officers to receive his declaratory statement duly presented.

Frisbie vs. *Whitney*, 9 Wall., 195.
Shepley vs. *Cowan*, 91 U. S., 338.

And if the action of the land officers, by erroneously construing the law, thus deprived him of a substantial right, his title to remedy in Equity is undoubted.

Minnesota vs. *Batchelder*, 1 Wall., 109;
Sampson vs. *Smiley*, 13 Wall., 91;
Ferguson vs. *McLaughlin*, 96 U. S., 174;
Moore vs. *Robbins*, *Id.* 530.

As to so much of the opinion of the Court below, as imputes want of *bona fides* to Peronto, in settling where the act made it probable that the road would run, it is sufficient to say, that inasmuch as at the time of his settlement, the lands being unsurveyed, it was impossible for him to know whether the lands on which he settled would be within an odd or an even section, no inference or assumption as to his *bona fides* can arise.

VI.

CONCLUSION.

We have thus considered the case in its two aspects, treating in turn the respective contentions that the company's road was definitely fixed in February, 1872, and that it was not so fixed until May, 1873. On each hypothesis, we have found the company without right to the lands claimed by

it, and Peronto to have had a clear right to those claimed by him.

In conclusion, we advert to the well-established doctrine of this Court: that the grant to the company is to be construed strictly and all doubts are to be resolved against it. "If the company is entitled to receive these lands, it must be on account of their falling clearly within the terms of the grant. Under public grants nothing passes by implication. In the clear and explicit language of the statute must be found all that is conveyed by the grant, and where doubt arises the statute must be construed most strictly against the grantee." (3 Dec. Dep. Int., p. 243.)

Rice vs. *R. R. Co.*, 1 Black, p. 380;
L. L. & G. Co. vs. *U. S.*, 92 U. S., p. 740;
Rice vs. *Sioux City Co.*, 110 U. S., 698.

For the reasons hereinbefore set forth, and in the light of this principle of construction, we submit that the judgment of the Court below is erroneous and should be reversed, and that the appellant is entitled to the relief prayed by the cross-complaint, as defined in *Silver* vs. *Ladd*, 7 Wall., p. 228.

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APPENDIX.

VAUGHAN *vs.* NORTHERN PACIFIC R. R. CO.

Withdrawals.—The land involved is within the limits of the road, as shown by map filed as map of definite location, July 6, 1882, and also within that of a withdrawal ordered April 21, 1873, upon a map of general route filed February 21, 1872.

Definite Location.—It is the definite location of a line of road—a location fixed beyond the power of the company to change it—that defines the granted lands. Until this is done, the lands are open to settlement notwithstanding the grant. Vaughan's settlement, though subsequent to the withdrawal of 1872, being prior to filing of map of definite location, is valid as against the company, and his application is held for allowance, subject to appeal.

COMMISSIONER SPARKS *to Register and Receiver, Bozeman, Montana, February 13, 1886.*

On April 11, 1885, James Vaughan applied to the Register of your office to make pre-emption filing for the N. ½ N. E. ¼ and E. ½ N. W. ¼ section 33, T. 1 S., R. 4 E, alleging under oath that he made settlement on said tract May 1, 1882, that he is an actual inhabitant thereof, that his improvements consist of a dwelling house and outhouses, and that he has had 55 acres of land under cultivation each year since date of settlement. This application was rejected on the ground that the tracts applied for were a part of an odd numbered section within the limits of the grant to the Northern Pacific Railroad Company. Vaughan appealed.

Said tracts are within 40 miles of the line of the road as shown by a map filed as map of definite location July 6, 1882.

They were also within the limits of a withdrawal ordered April 21, 1872, upon a map filed as a map of general route Feb. 21, 1872. By previous rulings of this office and Department it has been held that a legislative withdrawal followed the filing of such a map.

The question involved in this case is whether the act of July 2, 1864 (13 Stat., 365), authorizes a withdrawal or provides for a reservation of lands upon the filing of a map of

general route so as to defeat settlement rights under the public land laws prior to the time when the line of the road is definitely fixed.

In the case of Leavenworth, Lawrence and Galveston R. R. Co., *vs.* U. S. (92 U. S., 733), the Supreme Court, commenting upon the earlier practice of the land department in ordering withdrawals of lands within prospective railroad limits, said: "Formerly lands which would probably be affected by a grant were, as soon as it was made, if not in advance of it, withdrawn from market. But experience proved that this practice retarded the settlement of the country, and at the date of this act (1863), the rule was not to withdraw them until the road should be *actually located.* In this way the ordinary working of the land system was not disturbed. Private entries, pre-emption, and homestead settlements, and reservations for special uses, continued within the supposed limits of the grant, the same as if it had not been made. But they ceased when the routes of the roads were *definitely fixed*, and if it then appeared that a part of the lands within those limits had been either sold at entry, taken up by pre-emptors or reserved by the United States, an equivalent was provided."

In *Grinnell* vs. *R. R. Co.* (103 U. S., 739), the court said:

The only doubtful element of the problem is the location of the road, which, by the terms of these grants, is necessary to identify the sections granted on each side of it. Whenever that is done so that a surveyor or the officers of the land department can protract the line of the route on the maps of the public lands within the limits of the grants, *the identity of the lands granted is mathematically ascertained.*

In *R. R. Co.* vs. *Baldwin* (103 U. S., 426), the court, stating the reason of the law, said:

The limitations upon the grant are similar to those found in numerous other grants of land made by Congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located. This might take years, the time depending somewhat upon the length of the proposed road and the difficul-

ties of ascertaining the most favorable route. It was not for the interest of the country that in the meantime any portions of the public lands should be withheld from settlement or use because they might, perhaps, when the route was surveyed, fall within the limits of a grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and pre-emption, and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained, and providing that if any sections settled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired.

In *Van Wyck* vs. *Knevals* (106 U. S., 360), the court said:

The route must be considered as "definitely fixed" when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, "definitely fixed," and cannot be the subject of future change, so as to affect the grant, except upon legislative consent.

In *Winona and St. Peter R. R. Co.* vs. *Barney* (113 U. S., 625), the court said:

It was not for the interest of the country that any portion of the public lands should be withheld from sale and settlement because, when the route of the roads was definately determined, they might fall within the limits of the grants; nor was it the purpose of Congress to lessen the extent of its aid because it might ultimately be found that, at the time of its grant, or when the route was determined, portions of the land designated had already been disposed of or pre-emption rights had attached to them. The policy

of the government was to keep the public lands open at all times to sale and pre-emption, and thus encourage the settlement of the country, and, at the same time to advance such settlement by liberal donations to aid in the construction of railways. The acts of Congress in effect said: "We give to the State certain lands to aid in the construction of railways lying along their respective routes, provided they are not already disposed of, or the rights of settlers under the laws of the United States have not already attached to them, or they may not be disposed of or such rights may not have attached when the routes are finally determined. If at that time it be found that of the lands designated any have been disposed of or rights of settlers have attached to them, other equivalent lands may be selected in their place, within certain prescribed limits."

In *Kansas Pacific R. R. Co.* vs. *Dunmeyer* (113 U. S., 629), the court said:

The land granted by Congress was from its very character and surroundings uncertain in many respects, until the thing was done which should remove that uncertainty, and give precision to the grant. Wherever the road might go, the grant was limited originally to five sections, and by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles. These were to be odd numbered sections, so that the even-numbered sections did not pass by the grant. And these odd-numbered sections were to be those "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed." When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been

sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached, for, by examining the plats of this land in the office of the Register and Receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold or disposed of, or reserved, or homestead or pre-emption claims had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted. The grant is limited by its clear meaning to the other odd sections, and not to these.

And again in *Walden* vs. *Knevals* (114 U. S., 373), the court, re-affirming its former decision in *Van Wyck* vs. *Knevals*, said:

In the case mentioned we held that the route must be considered as "definitely fixed" when it had ceased to be the subject of change at the volition of the company, that until the map designating the route of the road was filed with the Secretary of the Interior, the company was at liberty to adopt such a route as it might deem best, after an examination of the ground had disclosed the advantages of different routes. But it was held that when the route was adopted by the company, and a map designating it was filed with the Secretary of the Interior, and accepted by that officer, the route was established. In the language of the act, it was "definitely fixed," and could not be the subject of further change so as to affect the grant, except by legislative consent; and that no further action was required on the part of the company to establish the route.

In the foregoing and similar decisions, the Supreme Court has settled the law and declared the uniform policy of the legislative railroad land grant system.

It is the definite location of a line of road—a location fixed beyond the power of the company to change it—that defines the granted lands. Until this is done the rights of settlement and entry and of appropriation for public purposes remain unimpaired, notwithstanding the grant. For lands thus taken out of the grant or not granted, by reason of sale, pre-emption, or otherwise (according to the terms

of the granting acts), prior to definite location, other lands may be selected in the prescribed manner within certain limits. Is there anything in the act making the grant to the Northern Pacific Railroad Company that changes the general rule—that fixes one period when the rights of settlement, entry, and appropriation for public purposes ceases, as to lands along some problematical line of route, and another and later period at which the right of the company attaches to other and different lands defined by another and different location?

The third section of the act granted certain alternate sections on each side of the road "whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, *at the time* the line of said road is *definitely fixed* and the plat thereof filed in the office of the Commissioner of the General Land Office;" and the act further provided that "whenever, *prior to that time*, any of said sections or part of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, *other lands* shall be selected by said company *in lieu* thereof," in the manner prescribed.

These provisions are similar to those of all the Pacific Railroad granting acts, and have been authoritatively construed in decisions above cited. The grant was of lands within described odd-numbered sections, which, "*at the time* the line of said road is *definitely fixed*," shall be free from all other appropriation, claims or rights. Lands which *at that time* should have been "granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of" were *not granted*. "The express and unequivocal language of the statute is, that the odd sections *not* in this condition are granted. The grant is limited by its clear meaning, to the *other* odd sections, not to these." (*Kansas Pacific Railroad Company* vs. *Dunmeyer*.) There is then no doubt as to *what* lands were granted and what were not granted, and no doubt as to the absolute right of disposal by the United States and of appropriation under the public land laws of any lands that might be found within the limits of the grant when the road should be definitely located, up to the time that such location should be legally made. The grant did not take effect until the precedent condition had

been performed of definitely fixing the line of the road in the time and manner prescribed by law.

The sixth section of the act provided: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of lands hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act."

It may be here observed that the act contains no provisions authorizing the company to sell any lands before receiving a patent.

The apparent purpose of the sixth section was to provide for surveying lands within the limits of the grant progressively with the construction of the road, and to reserve from disposal unsurveyed as well as surveyed lands after the grant should become effective within prescribed limits from the line of the road. The latter provision made clear the intention of Congress to reserve sections that might remain unsurveyed after that date; otherwise, the odd sections not being designated, it would be a question of much doubt whether the grant could be held to attach to such unsurveyed sections upon the fixing of the line of the road.

The language of the section is that "the odd sections hereby *granted* shall not be liable to sale," etc. The lands *granted* by the act were such as should be free from prior appropriation, etc., "*at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.*" Hence the lands provided to be reserved were such as at *date of definite location* should be found within the limits and terms of the grant. The President of the United States was required to cause the lands for forty miles in width on both sides of the *entire line of said road* to be surveyed as fast as required *by the construction of* the road. The surveys were to be made after the general route of the road should be fixed. The word "fixed" implies certainty. The surveys provided for were of lands along the "entire line of the road." The *actual line* of the road was of necessity the contemplation of the law. Such meaning is not only inher-

ent in the sense of the law, but is shown by the precise word "fixed" used in the statute. The "line of the road" could be determined only by fixed definite location. The President was not required to cause lands to be surveyed elsewhere than along that identical line. The surveys were to be made as fast *as required by the construction of the road.* The needs of construction did not require lands to be surveyed along any other line than along the line of construction, and construction was not authorized along any other line than the line of definite location, and the President had no authority under the 6th section to cause surveys to be made along any other line. The words "general route," therefore, do not imply any other or different line than the line of definite location, which, by the terms of both the third and sixth sections of the act must be "fixed," that is to say definitively and absolutely determined, before any rights accrued to the railroad company, or any duties devolved upon the Executive in connection with this grant. (*Cedar Rapids R. R.* vs. *Herring*, 110 U. S., 27.)

The railroad company, however, contended that the words "general route," in the phrase "after the general route shall be fixed," should be given a meaning independent of and in conflict with the general purport of the law and the specific provisions of the section in which those words are found; that they should be held to overthrow the major provisions and conditions of the operative clause of the granting act; that they should be held to mean something else than the general route of fixed definite location; that under an assumed ambiguity of expression the company might run experimental, or "trial" lines, or even lay down upon State and Tertitorial maps any lines they saw fit to so delineate, and all lands within forty miles on each side of such proposed or imaginary lines would become reserved by operation of the statute upon the filing of such maps in this office, leaving the company at liberty to ultimately fix the actual location of the road when and where it might please to do so.

This extraordinary proposition appears to have been assented to by Assistant Attorney-General Smith in 1873, and adopted by Secretary Delano. (Copp's L. L., 377.) The practical result of this construction of the law was that two imaginary lines were laid down upon maps of Minnesota several miles apart, evidently without survey, and that

when the road was finally constructed it was upon a line varying as much as twenty miles from the route on which withdrawal had been made upon the filing of the alleged maps of general route.

In Dakota, an alleged map of general route was filed in 1870, clearly made by ruling straight lines across a map of the Territory. In 1876, a map of "amended line" was filed which, for nearly the whole distance across the Territory, is from 40 to 80 miles south of the line proposed in 1870. Portions of the actual line of the road as constructed vary several miles from the amended line.

In Montana, an alleged general route was shown by staight lines ruled on a map filed in 1870. In 1872 a map of amended route was filed showing the proposed road to enter the Territory nearly 40 miles south of the point shown upon the map of 1870, and to leave the Territory at a point more than 200 miles north of the imaginary line of 1870.

In Idaho, an "amended line" of 1872 is 150 miles distant from a "proposed line" in 1870. In Washington Territory, a map of alleged general route (also marked out by straight lines) was filed showing the main line of the road as entering the Territory a little above the 46th parallel. A map of "amended main line" filed in 1872, fixed the place of entrance into the Territory at a point above the 48th parallel.

Three distinct maps were filed of the branch line in this Territory. One, filed in 1873, across the northern part of the Territory, and one in 1876, commencing in the southern part of the Territory, and one in 1879, across the central portion of the Territory. None of these were surveyed routes, and the line of supposed actual location varies from all of them. Under the several maps filed by the company, nearly the whole area of Washington Territory has been at different times withdrawn, and the lands held as reserved on account of this grant.

The questions before me as an administrator of the law are, whether I can recognize these constructive withdrawals as statutory reservations; whether the law permits a segregation of lands along uncertain, experimental, imaginary, or fictitious lines, prohibits settlers from entering upon lands within such segregations, doubles the price of even-numbered sections to the public, allows the railroad company to sell the odd sections, and then authorizes a repe-

tition of the segregations, prohibitions, and sales, and finally, after holding lands within these theoretical lines for years, to make a definite location on a different, or, as the case may be, a totally distinct line from any of the previous lines. It would certainly require very clear language to show such an intention on the part of Congress. I find nothing in the law to authorize even an implication to be drawn that such was the legislative intent. On the contrary, as I have already stated, the purpose of the 6th section can be understood and the statute given its effect without the suggestion of any conflict between that and the 3d section of the granting act. If there were doubt upon this point, the established rules of statutory interpretation would settle such doubt. The 6th section must be construed in harmony with the 3d, and both in accordance with the judicial interpretation that has been given to railroad granting acts.

In the present case, Vaughan alleges settlement on the tract prior to date of the filing in this office of a map purporting to be a map of definite location of the line of the road. No other map than a map of definite location was required to be filed by the company or authorized to be accepted by this office. Until a map of definite location should be filed, the land was open to settlement and entry as public lands under the public land laws of the United States. It is my opinion, therefore, that Vaughan is legally entitled to place his claim upon record, subject to due proof of settlement, residence, and improvement as required by the pre-emption laws, and that this would be true if the company had been authorized to make a definite location in 1882, a point which I do not here discuss.

His application is therefore held for allowance, subject to appeal to the Hon. Secretary of the Interior.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1885.

No. 253.

CHARLES W. BUTTZ, EXECUTOR OF FRANCIS PERONTO, DECEASED,

Appellant.

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY,

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

BRIEF FOR RESPONDENT.

W. P. CLOUGH,
Attorney for Respondent.

St. Paul, Minn.

PIONEER PRESS, ST. PAUL, MINN.

IN THE

Supreme Court of the United States.

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CHARLES W. BUTTZ, EXECUTOR OF FRANCIS PERONTO, DECEASED,
Appellant,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

BRIEF FOR RESPONDENT.

The railroad company, plaintiff below, brought this suit against Francis Peronto, defendant below, to eject him from a parcel of land lying in the heart of the city of Fargo, in Dakota Territory.

The railroad company, upon the trial claimed title to the property derived through its grant from the government.

Peronto, in his defense, admitted that the company had acquired the title to the land from the United States, but asserted

that the company had done so wrongfully, because of alleged prior rights in himself as a pre-emption settler.

See answer of Peronto, printed record, pp. 4–6.

The facts in the case are briefly as follows:

On July 2, 1864, the plaintiff's grant was made. (13th United States Statutes at Large, p. 365.)

The act making that grant contained the following passages:

"Sec. 2." * * * "The United States shall extinguish, "as rapidly as may be consistent with public policy and the "welfare of the said Indians, the Indian titles to all lands fall- "ing under the operations of this act and acquired in the do- "nation to the road named in this bill."

"Sec. 3. And be it further enacted, That there be, and "hereby is, granted to the Northern Pacific Railroad Company, "its successors and assigns, for the purpose of aiding in the "construction of the said railroad and telegraph line to the "Pacific coast, and to secure the safe and speedy transportation "of the mails, troops, munitions of war and public stores over "the route of said line of railway, every alternate section of "public land not mineral designated by odd numbers, to the "amount of twenty alternate sections per mile on each side of "said railroad line, as said company may adopt through the "territories of the United States, and ten alternate sections of "land per mile on each side of said railroad wherever it passes "through any state, and whenever, on the line thereof, the "United States have full title, not reserved, sold, granted, or "otherwise appropriated, and free from pre-emption, or other "claims or rights, at the time the line of said road is definitely "fixed, and a plat thereof filed in the office of the commis- "sioner of the general land office,

* * * * * * * * * * *

"Sec. 4. And be it further enacted, That whenever said "Northern Pacific Railroad Company shall have twenty-five "consecutive miles of any portion of said railroad and telegraph "line ready for the service contemplated, the president of the "United States shall appoint three commissioners to examine "the same, and if it shall appear that twenty-five consecutive "miles of said railroad and telegraph line have been completed "in a good, substantial, and workmanlike manner, as in all other "respects required by this act, the commissioners shall so re-

"port to the president of the United States, and patents of lands "as aforesaid shall be issued to said company confirming to "said company the right and title to said lands situated opposite "to and coterminous with said completed section of said road; "and from time to time whenever twenty-five additional con- "secutive miles shall have been constructed, complete, and in "readiness as aforesaid, and verified by said commissioners to "the president of the United States, then patents shall be is- "sued to said company conveying the additional sections of "land as aforesaid."

* * * * * * * * * * *

"SEC. 6. And be it further enacted, That the president of "the United States shall cause the lands to be surveyed for "forty miles in width on both sides of the entire line of said "road after the general route shall be fixed, and as fast as may "be required by the construction of said railroad, and the odd "sections of land hereby granted shall not be liable to sale or "entry or pre-emption before or after they are surveyed, except "by said company as provided in this act; but the provis- "ions of the act of September, eighteen hundred and forty- "one, granting pre-emption rights, and the acts amendatory "thereof, and of the act entitled 'an act to secure homesteads "to actual settlers on the public domain,' approved May "twenty, eighteen hundred and sixty-two, shall be, and the "same are hereby, extended to all other lands on the line of "said road when surveyed, excepting those hereby granted to "said company; and the reserved alternate sections shall not "be sold by the government at a price less than two dollars "and fifty cents per acre when offered for sale."

At the time of the passage of this act, that part of Northern Dakota Territory lying between the James River and the Red River of the North was in the occupation of the Wahpeton and Sisseton bands of the Sioux Indian Nation. However, no possessory rights in these bands to this region had been formally recognized by the United States prior to the conclusion of the treaty with the same, in the year 1867. (15th United States Statutes at Large, pp. 505-511.) Article 2 of that treaty was in the following language:

"ARTICLE II. The said bands hereby cede to the United "States the right to construct wagon roads, railroads, mail "stations, telegraph lines, and such other public improvements as "the interest of the government may require over and across the "lands claimed by said bands (including their reservation as "hereinafter designated), over any route or routes that may be "selected by authority of the government, said lands so claimed "being bounded on the south and east by the treaty line of "1851 and the Red River of the North to the mouth of Goose "River, on the north by the Goose River and a line running "from the source thereof by the most westerly point of Devils "Lake to the Chief's Bluff at the head of James River, and "on the west by the James River to the mouth of Mocasin "River, and thence to Kampeska Lake."

By the third and fourth articles of the same treaty, two small areas situated within the region recognized by article 2 as belonging to the Indians mentioned, were respectively assigned to them as permanent reservations. But no portions of such permanent reservations fell within the limits of the grant to the railroad company as such limits were subsequently ascertained by the location of its railroad.

Some time in the fall of the year 1871, the treaty of 1867 yet remaining in full force, the railroad company, proceeding under the several acts and joint resolutions of Congress relating thereto, commenced work on that part of its line of railroad beginning on the westerly bank of the Red River of the North, and extending westerly, through and across what was afterwards shown by the public surveys to be the section of land of which the tract in controversy forms part, to-wit: section numbered seven (7) in township numbered one hundred and thirty-nine (139) of range numbered forty-eight (48) west of the fifth principal meridian. During the same fall, the railroad company caused all that part of its line of railroad, as the same had been located across the said tract of ground, to be graded and prepared for the superstructure thereof.

In the month of June of the year following, the railroad company caused the superstructure of its railroad to be placed upon the said graded roadbed, and fully completed all that part of its railroad running over and across the section of land mentioned; and, ever since that time, the railroad has been maintained and operated over and across the said section, on the line so established therefor in the year 1871.

See findings of court below, printed record, p. 48.

On October 5, 1871, the region being unsurveyed on account of the existence of the outstanding right of Indian occupation therein, the defendant below, Francis Peronto, a native citizen of the United States, having the qualifications of a pre-emptor, entered upon the tract of land in dispute, and erected a dwelling house upon the same, and thereupon took up his abode in such house, where he had continued to reside up to the time of the trial of the suit. He improved three or four acres of land near the house, by breaking up and cultivating the same; and, in the month of May, 1873, had a crop growing thereon. Peronto entered upon the tract with the view and purpose of making a pre-emption of the same under the laws of the United States; but on account of these and the other lands in the vicinity not having been surveyed at the time of such entry, the court below was unable to determine what particular government subdivion or subdivisions Peronto proposed to pre-empt, before the time of the making out by him of his declaratory statement hereinafter referred to.

See findings of court below, printed record, p. 51.

In the month of February, 1872, the railroad company filed in the office of the secretary of the interior, at Washington, a map showing all that part of the general route of its railroad, beginning at the westerly bank of the Red River of the North, and extending westwardly to the James River in Dakota Ter-

ritory. All that part of such general route extending from the westerly bank of the Red River of the North to what subsequent surveys showed to be the westerly line of the said section seven (7), was identical with the location thereof made in the year 1871, before mentioned.

See findings of court below, printed record, pp. 48, 49.

After the filing of the map of general route, and on March 30, A. D. 1872, W. W. Curtis, then the acting commissioner of the general land office of the United States, in his official capacity, made out and forwarded to the register and receiver of the land office for the Pembina district, in which the said tract of land was then situated, a letter of instructions, whereof the following is a copy, to-wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, WASHINGTON, D. C., March 30, 1872.
"*Register and Receiver, Pembina, Dakota Territory,*

"GENTLEMEN: I transmit herewith diagram showing the "designated route of the Northern Pacific Railroad under act "of July 2., 1864, and by direction of the secretary of the "interior you are directed to withhold from sale or location, "pre-emption, or homestead entry all the surveyed and unsur- "veyed odd-numbered sections of public lands falling within "the limits of forty miles as designated on this map.

"You will also increase in price to $2.50 per acre the even- "numbered sections within these limits, and dispose of them "at that ratability, and under the pre-emption and homestead "laws only. No private entry of the same being admissible "until these lands have been offered at the increased price.

"This order will take effect from the date of its receipt by "you, and you are requested to acknowledge without delay the "time of its receipt.

"Very respectfully,
"W. W. CURTIS,
"Acting Commissioner."

This letter was received, together with the diagram therein referred to, by the register and receiver to whom it was addressed, on April 20, A. D. 1872.

The diagram represented the route of railroad as passing over and across the section of land in question. The withdrawal made by this letter was never afterward revoked.

See findings of court below, printed record, p. 49.

On June 7, 1872, Congress passed an act entitled "An act to quiet the title to certain lands in Dakota Territory," which act was in terms following:

"*Be it enacted by the Senate and House of Representatives of* "*the United States of America in Congress assembled*, That it "shall be the duty of the secretary of the interior to examine "and report to Congress what title or interest the Sisseton and "Wahpeton bands of Sioux Indians have to any portion of the "land mentioned and particularly described in the second arti- "cle of the treaty made and concluded with said bands of In- "dians on the nineteenth day of February, eighteen hundred "and sixty-seven, and afterwards amended, ratified, and pro- "claimed on the second day of May, of the same year, or by "virtue of any other law or treaty whatsoever, excepting such "rights as were secured to said bands of Indians by the third "and fourth articles of said treaty, as a 'permanent reserva- "tion;' and whether any, and, if any, what, compensation "ought, in justice and equity, to be made to said bands of In- "dians, respectively, for the extinguishment of whatever title "they may have to said lands."

17th United States Statutes at Large, p. 281.

In pursuance of this act, the secretary of the interior, shortly after its passage, appointed a commission of three persons, who proceeded to make a formal agreement or treaty with the Indians, concerning the lands and reservations embraced in the original treaty of the year 1867. The new treaty was signed on Sept. 20, A. D. 1872, and was in nine articles. The first article of this instrument is the only one of importance in this controversy, and was in the following words:

"Therefore, the said bands represented in said treaty, and "parties thereto, by their chiefs and head men, now assembled "in council, do propose to M. N. Adams, William H. Forbes,

"and James Smith, Jr., commissioners on behalf of the United "States, as follows:

"*First.*—To sell, cede, and relinquish to the United States "all their right, title and interest in and to all lands and ter- "ritory particularly described in Article II of said treaty, as "well as all lands in the Territory of Dakota to which they "have title or interest, excepting the said tracts particularly "described and bounded in Articles III and IV of said treaty, "which last-named tracts and Territory are expressly reserved "as permanent reservation for occupancy and cultivation, as "contemplated by Articles VIII, IV and X of said treaty.

See printed record, pp. 17–21.

This agreement seems not to have been presented to the Senate for ratification as a treaty, but the general Indian Appropriation Bill, approved Feb. 14, 1873, contained the following clause:

"*Sioux, Sisseton and Wahpeton and Senate Sioux of Lake* "*Traverse and Devil's Lake.*—For this amount, being the first of "ten installments of the sum of eight hundred dollars named in a "certain agreement, made by the commissioners appointed by "the secretary of the interior, under the provisions of the act "of June seventh, eighteen hundred and seventy-two, with "the Sisseton and Wahpeton bands of Sioux Indians, for the "relinquishment, by said Indians, of their claim to or interest "in the lands described in the second article of the treaty made "with them February nineteenth, eighteen hundred and sixty- "seven, the same to be expended under the direction of the "president for the benefit of said Indians, in the manner pre- "scribed in said treaty of eighteen hundred and sixty-seven, "as amended by the Senate, eighty thousand dollars. And "the said agreement is hereby confirmed excepting so much "thereof as is included in paragraphs numbered respectively, "third, fourth, fifth, sixth, seventh, eighth, and ninth; *Pro-* "*vided*, That no part of this amount shall be expended until "after the ratification by said Indians of said agreement as "hereby amended."

17th U. S. Stats. at Large, p. 456.

After the passage of the act above quoted from, further negotiations based thereon were had between the commission-

ers and the Indians, which resulted in a supplementary agreement, modifying the original draft of the same so as to conform with the provisions of the act. The supplementary agreement was executed on behalf of a portion of the Indians at the Sisseton Agency, on the southerly, or Lake Traverse, reservation, on May 2, A. D. 1873, and on behalf of the remainder at the Fort Totten Agency, on the northerly, or Devils Lake, reservation, on May 19, A. D. 1873.

See printed record, pp. 17–22.

Within a few days after the conclusion of the supplementary agreement, but upon what precise date did not appear at the trial below, the government land surveys of the region relinquished by the Indians were completed and plats thereof were filed in the land offices.

On May 26, A. D. 1873, the railroad company filed in the office of the commissioner of the general land office, a map showing the definite location of that part of its railroad extending from the westerly bank of the Red River of the North to the easterly bank of the Missouri River. All that portion of such definite location, extending from the westerly bank of the Red River of the North as far west as the west line of the said section seven (7) was the same location thereof made in the year 1871 as hereinbefore stated.

See findings of court below, printed record, pp. 49, 50.

After the filing of this map of definite location, and on June 11, A. D. 1873, the acting commissioner of the general land office made out and forwarded to the register and receiver of the said Pembina land office a further letter of instructions of which the following is a copy:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

"*Register and Receiver, Pembina, Dakota Territory,*

"GENTLEMEN: The Northern Pacific Railroad Company "filed in this office, on the 26th ult., in accordance with law, "a map of the definite location of their road from the Red "River of the North to the Missouri River, in Dakota Terri- "tory. I have accordingly prepared a diagram, which is here- "with transmitted, showing the forty and fifty mile limits of "their land grant along said line, with also the forty-mile "limits of withdrawal ordered by my letter to you of March 30, "1872, upon a designated line; and you are hereby directed to "withhold from sale or entry all the odd-numbered sections, "both surveyed and unsurveyed, falling within those limits, "and to hold subject to pre-emption and homestead entry only, "the even-numbered sections, at $2.50 per acre, within the "forty-mile limits, and $1.25 per acre between the forty and "fifty mile or indemnity limits. The even-numbered sections "within the forty-mile limits of the former withdrawal, now "falling without the present corrected limits, will be reduced "in price to $1.25 per acre. The right of the road attaches to "both surveyed and unsurveyed lands from the date of filing "the map of definite location in this office, to-wit, May 26, "1873, from which date also the even sections become double "minimum. Be pleased to acknowledge the date of the re- "ceipt of this letter.

Very respectfully,
W. W. CURTIS,
Acting Commissioner."

This letter, together with the map of definite location therein referred to, was received by the register and receiver of the Pembina office on June 24, A. D. 1873.

See findings of court below, printed record, p. 50.

On June 19, A. D. 1873, the agreement between the commissioners and the Indians, as modified in obedience to the act of Congress, was approved by the secretary of the interior; and, by letter of June 25, 1873, from the commissioner of Indian affairs, the commissioner of the general land office was officially notified of the conclusion of the agreement.

See letter from commissioner of general land office to register and receiver under date Aug. 20, 1873. Printed record, p. 15.

After all the things hereinbefore mentioned had been done, and on July 28, A. D. 1873, Peronto made out, in the usual form, his declaratory statement, alleging his intention to pre-empt certain subdivisions of the said section seven (7), containing one hundred and fifty and ninety-five one-hundredths (150.95) acres, and claiming settlement on October 5, A. D. 1871.

See findings of court below, printed record, p. 51, and for copy of D. S., *Ibid*, p. 11.

The declaratory statement, however, was not presented to the local land officers until Aug. 11, 1873, when it was tendered at the Pembina office, and refused by the register and receiver for reasons indicated by a memorandum made by those officers at the time, of which the following are the essential portions:

"LAND OFFICE, PEMBINA, D. T.
11 AUG., 1873.

"The declaratory statement of Francis Peronto * * * "offered this day, cannot be filed for the reason that the lands "therein described are railroad lands, as shown by the diagram "filed in the Department of the Interior 21st of February, "1872, by the Northern Pacific Railroad Company. The al- "leged settlement prior to the filing of the said diagram and "withdrawal of the odd sections are illegal, and cannot be "recognized by this office, as the lands, by reason of Indian "treaty, were not subject to homestead or pre-emption settle- "ment. * * * * * *

"Very respectfully,
"L. B. BRASZER, *Register.*
"GEORGE F. POTTER, *Receiver.*"

See printed record, pp. 11, 12.

From this decision of the local officers, Peronto, through

his attorney, on October 11, A. D. 1873, appealed to the commissioner of the general land office.

See printed record, p. 12.

On February 14, A. D, 1874, the commissioner rendered an opinion upon the appeal, the essential portions of which were as follows:

"DEPARTMENT OF THE INTERIOR.
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., Feb. 14, 1874.

"*Register and Receiver, Pembina, D. T.,*

"GENTLEMEN: Referring to your letter of October 16th, and "January 27th last, transmitting papers on appeal from your "decision rejecting the declaratory statements of the following "parties for conflict with the grant to the Northern Pacific "R. R. Co., to Francis Peronto, * * * *
"alleging settlement October 5, 1871, * * *.
"I have to state that I find upon examination that all of the "tracts are within the limits of the grant to the Northern "Pacific R. R. Co., which attached to the odd sections May "26, 1873, and at the date of the alleged settlement the lands "were embraced in the Sisseton and Wahpeton Indian reser- "vation, the Indian title to which was not extinguished until "May 2d, 1873, at which date the withdrawal for the company "became effective, thus excluding any prior pre-emption claims "to the odd sections, which could only attach after the extin- "guishment of the Indian title. I therefore approve your action "in rejecting the declaratory statements as to the odd sections "and you will so advise the parties, allowing the usual sixty "days for appeal.

"Very Respectfully,
"WILLIS DRUMMOND,
"Commissioner.

See printed record, pp. 12, 13.

From the decision of the commissioner of the general land office, Peronto, through his attorney, appealed to the secretary or the interior; which official, on Sept. 19, A. D. 1874, affirmed the ruling of the commissioner.

See printed record, p. 14.

So far as disclosed by the record, the foregoing proceedings

before the land officers comprise the whole of the efforts of Peronto to establish his claim to the land described in his declaratory statement.

The present suit was begun by the railroad company in April, A. D. 1881, in the district court of the Territory, for the county in which the lands lie. Upon the trial that court rendered judgment in favor of the company; which, upon appeal by Peronto to the supreme court of the Territory, was affirmed.

From such judgment of affirmance this appeal was taken.

POINTS AND AUTHORITIES.

I.

The entry by Peronto upon the tract of land in dispute in October, 1871, was unlawful because the same was situated in Indian country and the Indian title thereto had never been extinguished. Hence such entry conferred no rights whatever upon him as against anybody or for any purpose.

II.

The entry by the railroad company into the region lying to the westward of the Red River of the North was perfectly lawful and regular; for the reason, among other things, that the Indians had given their permission for such entry, by Article 2, of the treaty of 1867.

III.

The lands within the ceded district probably did not come within the category of public lands subject to pre-emption un-

til the approval by the secretary of the interior of the supplemental agreement with the Indians, on June 19, A. D. 1873, and the official notification of such action by the commissioner of Indian affairs, to the commissioner of the general land office, on the twenty-fifth of the same month. Possibly, the agreement did not go into effect until the passage of the regular Indian appropriation bill, approved June 22, 1884. That act contained the following provision:

"For this amount, being the second of ten installments "of the sum of eight hundred thousand dollars named "in a certain agreement, which agreement is hereby "confirmed, made by the commissioners appointed by the "secretary of the interior, under the provisions of the act of "June seventh, eighteen hundred and seventy-two, with the "Sisseton and Wahpeton bands of Sioux Indians for the relin-"quishment by said Indians of their claim to, or interest in, the "lands described in the second article of the treaty made with "them February nineteenth, eighteen hundred and sixty seven, "the same to be expended, under the direction of the president, "for the benefit of said Indians, in the manner prescribed in "said treaty of eighteen hundred and sixty-seven, as amended "by the Senate, said amendment as amended having been rati-"fied by the Indians, as provided by act of February fourteenth, "eighteen hundred and seventy-three, eighty thousand dol-"lars."

18th U. S. Stat's at Large, part 3, p. 167.

If the lands in the ceded country did not become open to settlement until the approval by the secretary of the interior of the supplemental agreement, and the giving of official notice thereof to the commissioner of the general land office, the railroad company had filed, in the general land office, its map of definite location, showing its line of road as passing directly over the section embracing the tract here in controversy, nearly one month before any lawful entry could have been made upon any lands within the ceded territory, with a

view to acquisition of the same under the pre-emption or homestead laws of the United States.

IV.

If the cession by the Indians is to be deemed as having taken effect upon the conclusion of the supplementary agreement, so as to throw the lands in the ceded country at once open to settlement, in that case such cession took effect on May 19, 1873.

It will be observed that the commissioner of the general land office, in assigning his reasons for the refusal of Peronto's declaratory statement, fell into the error of supposing the supplementary agreement to have been concluded on the second, instead of the nineteenth, day of the month. The supplemental agreement was executed by one of the bands on the second, but not by the other until the nineteenth, of May; and, of course, the agreement did not become one amounting to a complete cession of the lands until all the Indians having an undivided interest therein had made themselves parties to the cession.

In this view of the case, there occurred an interval of seven days between the time when the cession took effect and the date of the filing by the railroad company of its map of definite location with the commissioner of the general land office. But this interval between the date of the signing by the Indians of the supplemental agreement, and that of the filing of the map of definite location, is not a matter of any consequence, in any view of the case.

In the fore part of the year 1872, the railroad company filed in the interior department, a map, showing that portion of its general route extending across the ceded region. That

map exhibited the line of the railroad as located over and across the section of land referred to, and as occupying precisely the same location as that upon which the road was constructed and completed. As a matter of fact, the definite location had actually been made upon the ground, and the roadbed been constructed, some months before the map of general route was filed; and within the first half of the year in which the filing of the map of general route occurred the road was actually completed and put into operation upon the line mentioned.

Upon the filing of the map of general route, the commissioner of the general land office, acting under instructions of the secretary of the interior, made an express withdrawal for the benefit of the railroad company from pre-emption or homestead settlement, or entry by any other mode, of all odd numbered sections of land lying within the distance of forty miles upon either side of the line of general route. Such withdrawal was never subsequently vacated.

The making of this withdrawal was entirely within the competency of the government land officials.

Walcott *vs.* Des Moines Co., 5 Wall. 681.
Williams *vs.* Baker, 17 do., 144.
Homestead Co. *vs.* R. R. Co., 17 do., 153.
Wolsey *vs.* Chapman, 101 U. S. 755.
Dubuque R. R. Co. *vs.* Des Moines R. R. Co., 109 U. S. 329.

While Congress may not be considered as having in the granting act specifically commanded such withdrawals to be made for the benefit of this company, upon filing maps of its general route, that body certainly did not prohibit the same, and, undoubtedly, must be considered as having legislated in

expectation that they would be made for the benefit of this company, as had been done for the benefit of nearly every other railroad company enjoying a similar grant. The practice of making such withdrawals began with that of making grants of public land to aid public improvements. The withdrawal in favor of the Territory of Iowa of lands which it was expected would fall within the grant to that State for the Des Moines River improvement was made in the year 1849, before the first railroad grant had been made.

With the practice by Congress of making grants to aid in the construction of railroads came that by the officers of the land department of making withdrawals even in anticipation of the passage of acts conferring such grants.

During the first four years in the history of such legislation, the land department, in nearly every case, as the records of that department show, anticipated Congress by making withdrawals of lands along the proposed route of the road before any grant therefor existed.

This practice, however, was abolished in the year 1854, and the new one adopted of withholding the withdrawal until the passage of the act making the grant.

The new procedure under this head was announced by the secretary of the interior in a letter of instructions to the commissioner of the general land office, of the following tenor:

"DEPARTMENT OF THE INTERIOR,
"August 29, 1854.

"SIR: It has been determined, with the approbation of the "president, after due consideration on the subject, to bring "again into market the lands heretofore reserved for railroad "purposes, in all cases where grants had not been made at the "close of the late session of Congress, and to decline in future

"to withdraw lands for such purposes until after the necessary "grant shall have been actually made.

"R. M'CLELLAND,
"*Secretary.*

"*Commissioner of the General Land Office.*"

1 Lester's Land Laws, Regulations and Decisions, p. 520, No. 554.

From this time on, until long after the date of the Northern Pacific grant, the records mentioned will further show that, in nearly all instances, withdrawals were made for the benefit of the grantees, almost, or quite, immediately after the taking effect of the grant, and before the filing in the land department of any official map of route whatever. The line which the proposed railroad would probably follow was ascertained as nearly as possible, and withdrawals were made of lands along it, so as to preserve to the grantee the benefit of the grant during the necessary period for preliminary explorations incident to definite location.

Hence, it must be considered, in construing all acts of Congress making such grants, that it was the expectation of that body that the land department of the government would use the powers vested in it to promote the purposes of the grant by the withholding from entry by individuals, of lands which would otherwise fall to the company under its grant by the location and construction of its railroad.

The fact that when the withdrawal of 1872 was made the region through which the line ran was yet Indian country did not invalidate such withdrawal. This would have been true even if the act making the grant had not contained a clause expressly declaring the intention of Congress that lands should not be lost by the company, because there might happen to be an outstanding Indian title thereto. This court so expressly

decided in the case last above cited; but the several grants in aid of the Pacific railroad companies contain clauses extending the grant to Indian lands as well as to others.

In the Union Pacific act, the last clause of section 2 is as follows:

"The United States shall extinguish, as rapidly as may be, "the Indian titles to all lands falling under the operation of "this act and required for the said right of way and grants "hereinafter made."

12 U. S. Statutes at Large, pp. 491, 492.

The last clause of the corresponding section of the act making the grant to this company is identical in substance, and almost in words, to-wit:

"The United States shall extinguish, as rapidly as may be "consistent with public policy and the welfare of the said In-"dians, the Indian titles to all lands falling under the operation "of this act, and acquired in the donation to the road named "in this bill."

13th U. S. Statutes at Large, p. 365.

It may be here remarked, that if lands within the Indian country had been excluded from the grant to the Northern Pacific Railroad Company, no grant of any consequence would have inured to it, as the greater part of the region traversed by the route of that company between Lake Superior and the Pacific Ocean was at the time of the making of its grant, and for many years thereafter remained, subservient to Indian rights of occupation.

This court has expressly recognized, in the case last cited, the existence of these clauses in the Pacific railroad grants, and their effect.

See opinion of court, p. 334.

Hence, the withdrawal of 1872 perpetually removed the whole of section seven (7) referred to from the body of lands